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Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1383

EDWARD JOSEPH WEDELSTEDT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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EDWARD JOSEPH WEDELSTEDT,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case. That judgment affirmed petitioner's conviction on three counts of the indictment in the district court—one count of conspiracy, under 18 U.S.C. §371; one count of receipt of stolen property moving as and part of interstate commerce, under 18 U.S.C. §§2 and 2315; and one count of interstate transportation of obscene materials for purposes of distribution, under 18 U.S.C. §§2, 3 and 1465.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 589 F. 2d 339 (8th Cir. 1978), is set forth in the Appendix, *infra,* pp. A 11-A 35.

The District Court delivered two opinions, which are unreported. They are set forth in the Appendix, *infra,* beginning at p. A 36. A related unreported opinion by the State of Iowa's District Court for Linn County is set forth in the Appendix, *infra,* at pp. A 61-62.

Jurisdiction

The opinion of the Court of Appeals affirming petitioner's conviction was filed on December 15, 1978. Appendix, *infra,* p. A 11. The Court of Appeals denied the petitioner's motion for rehearing on January 9, 1979. Appendix, *infra,* p. A 10. On January 27, 1979, Mr. Justice Blackmun, upon application by petitioner, entered an order extending the time for filing a petition for writ of certiorari to and including March 10, 1979. Appendix, *infra,* p. A 9.

This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

Questions Presented for Review

I.

Should a federal conspiracy conviction be reversed when a general jury verdict is returned on a count alleging a multiple objective conspiracy and it is later determined that one of the objectives charged does not constitute a federal offense?

II.

Is a petitioner denied a fair trial by the joinder in a single indictment of charges stemming from two separate

transactions, one of which does not constitute a federal offense and which, in any event, is separate and distinct from the other transaction?

III.

Is an unlawful seizure of evidence by a paid police informant who is promised immunity if he obtains incriminating evidence against the petitioner attributable to the state and, therefore, violative of the Fourth and Fourteenth Amendments?

IV.

Does a petitioner, after the denial on the merits of his pretrial motion to suppress evidence claimed to have been unconstitutionally seized, waive his Fourth Amendment objections to the admission of such evidence when, in an attempt to reduce the damaging effect of such evidence, which he knows will be introduced by the government, he is the first party to interrogate a government witness about such evidence and when he does not formally object again to the admission of such evidence when it is offered by the government at trial, but renews his objection at the close of the government's case and again at the close of all the evidence?

V.

Is a search warrant constitutionally defective when it is issued on the strength of an affidavit which, in its important part, merely recites the conclusions of a police informant that a theft of certain films occurred and that the stolen films are being stored at the petitioner's warehouse without setting forth the underlying facts upon which the informant based his conclusion that the theft occurred and that the films he observed at petitioner's warehouse

were stolen films, and which includes key information unlawfully seized on a prior occasion by a paid police informant who was promised immunity if he obtained incriminating evidence against the petitioner?

VI.

In a federal obscenity prosecution, is it error for the district court to refuse to instruct the jury that in judging whether the allegedly obscene materials depict sexual conduct in a patently offensive way the jury must apply contemporary community standards?

VII.

Is a conviction for aiding and abetting the interstate transportation of obscene films under 18 U.S.C. §§2 and 1465 supported by evidence showing that the petitioner neither induced, encouraged, participated in or had knowledge of the theft and interstate transportation of allegedly obscene films by third parties, but that, on a prior occasion, he induced an unsuccessful attempt to pilfer the films?

Constitutional Provisions and Statutes Involved

The text of the First and Fourth Amendments, and the pertinent portion of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix, *infra*, p. A 1. Title 18, U.S.C., Sections 2, 3, 371, 1465, 2314 and 2315 are set forth in the Appendix, *infra*, pp. A 2-A 8.

Statement of the Case

A. Procedural History

On May 12, 1977, a federal grand jury in the Northern District of Iowa returned a five-count indictment against the petitioner. Count one charged him with a conspiracy, in violation of 18 U.S.C. §371. Count two alleged that the petitioner had aided and abetted the interstate transportation of stolen goods, in violation of 18 U.S,C. §§2, 3 and 2314. Counts three and five each charged the petitioner with the receipt of stolen goods moving as and part of interstate commerce, in violation of 18 U.S.C. §§2 and 2315. Count four charged the petitioner with the interstate transportation of obscene materials, in violation of 18 U.S.C. §§2, 3 and 1465. A jury trial resulted in the petitioner's conviction on counts one, three and four of this indictment in September, 1977. The district court sentenced the petitioner to concurrent prison sentences of five years on count one, five years on count three and three years on count four. In addition, the trial court fined the petitioner $5,000.00 for his conviction on count one and $2,500.00 for his conviction on count four. His conviction was affirmed by the United States Court of Appeals for the Eighth Circuit on December 15, 1978. That court denied his petition for rehearing on January 9, 1979.

B. Facts

The prosecution against petitioner centered around his alleged connection to two distinct and wholly unrelated thefts which occurred in 1974. The first of these thefts—referred to as the "Shepard transaction" throughout this litigation—occurred in September, 1974, when Thomas Meade, who later became a government agent and paid

informant for the Iowa Bureau of Criminal Investigation, burglarized the home of David Shepard in Davenport, Iowa, and stole Shepard's private collection of classic motion picture films (Tr. 137-138, 171).[1]

The second theft—referred to as the "Chicago transaction" in the courts below—occurred three months later when three individuals broke into a warehouse in Chicago, Illinois, and stole a large quantity of sexually oriented motion picture films (Tr. 273-278). The evidence introduced to connect the petitioner to these disparate crimes will be considered separately.

1. The Shepard Transaction

The private film collection of David Shepard was stolen from his home in Davenport, Iowa, in September, 1974, by Thomas Meade (Tr. 134-138). Meade transported the films from Davenport, Iowa to Cedar Rapids, Iowa, where they were delivered to the petitioner (Tr. 134-138), whose plan was to sell the films. To that end, the petitioner attempted unsuccessfully to locate a buyer.

In the meantime, Meade, who had stolen the films, had negotiated a deal with the Iowa Bureau of Criminal Investigation ("BCI"). In exchange for "getting the goods on Wedelstedt", Meade was granted immunity for certain crimes he had committed (Tr. 11-12, Supp. Hear.).[2] He and the BCI concocted a plan whereby they created a fictitious west coast buyer for the Shepard films who would come to Cedar Falls, Iowa to consummate the transaction (Tr. 599-600). The petitioner agreed to transport the classic

[1] The abbreviation "Tr." refers to the trial transcript.

[2] The abbreviation "Tr. Supp. Hear." refers to the transcript of the hearing on petitioner's motion to suppress evidence.

films to Cedar Falls where they would be delivered to this nonexistent buyer. In arranging for the shipment of the films, the petitioner enlisted the aid of Bruce Gentry, who was indicted with the petitioner and who entered into a plea bargain with the government and testified against the petitioner (Tr. 315, 395). When the films were moved from Cedar Rapids, Iowa to Cedar Falls, Iowa, the BCI was waiting and recovered the films.

As a result of the episode involving the Shepard films, the petitioner was charged, in count five, with the receipt of stolen goods moving as and part of interstate commerce, under 18 U.S.C. §§2 and 2315. In addition, under the count one conspiracy charge, the petitioner was charged, *inter alia,* with conspiring to receive, conceal and sell stolen goods moving as and part of interstate commerce, to wit: the Shepard films.

The petitioner argued that whatever his involvement may have been in the Shepard transaction, it did not amount to a federal offense, because the Shepard films were never moving as part of and never constituted interstate commerce, the key element of the federal offenses charged.[3] The petitioner presented this argument in pretrial motions to dismiss and to sever counts as well as at the jury trial. In response to his pretrial motion to dismiss, the government conceded that it would be unable to prove that the Shepard films had ever left the state of Iowa. Based on that concession, the district court dismissed count five and that part of count one which pertained to the Shepard films. The district court, however, later reversed itself as to its decision to dismiss part of count one, when the government represented that it could prove that the petitioner intended to sell the films to a buyer whom the petitioner

[3] The petitioner had already been convicted of a state offense pertaining to the Shepard transaction.

had reason to believe would transport the Shepard films out of the state. On the basis of that representation, the district court concluded that the petitioner could properly be charged with conspiracy to receive and sell stolen goods moving as and part of interstate commerce. Accordingly, the district court reinstated that part of the conspiracy count which it had previously dismissed.

2. The Chicago Transaction

Bruce Gentry had been an employee of one of the petitioner's businesses in Iowa in the year 1974 (Tr. 249-250). After being laid off by the petitioner, he returned to his hometown, St. Louis, Missouri (Tr. 270). There, in December, 1974, he and two of his friends, Richard Dobler and Dennis Leone planned the burglary of an adult film warehouse in Chicago, Illinois (Tr. 270). They drove to Chicago from St. Louis, broke into the warehouse, and stole a quantity of sexually oriented films (Tr. 273-278). They transported the films from Chicago to the petitioner's home in Cedar Rapids, Iowa, where they offered to sell the films to the petitioner (Tr. 279-283). The petitioner agreed to purchase the films at a price of $2.50 for each film (Tr. 282-283). The three thieves were indicted along with the petitioner, but all three entered into a plea bargain with the government under the terms of which they testified against petitioner at trial (Tr. 315, 395).

All three testified for the government that the petitioner had nothing to do with the planning, direction, inducement or procurement of the theft or the subsequent transportation of the stolen property. All three agreed that the theft and interstate transportation of the films had both been the sole ideas of Gentry. All testified that the petitioner had not been aware of the theft or the transportation of the films until after it had occurred. Indeed, Leone and Dobler testified that they had never met the petitioner before arriving at his home in Iowa after the theft (Tr. 317-319, 321-322, 363, 372-373).

Gentry and Thomas Meade, the informant, gave testimony concerning an earlier attempt to burglarize the same warehouse, an attempt which was induced by the petitioner. At that time, the petitioner suggested that Gentry and Meade break into the warehouse, steal films and deliver them to the petitioner (Tr. 259-265). Meade, however, was already an agent for the Iowa Bureau of Criminal Investigation, which did not want him to participate in the contemplated crime (Tr. 610). Accordingly, when Meade and Gentry went to the warehouse to carry out their plan, the BCI made sure that there were enough people present in the vicinity to make commission of the burglary too risky (Tr. 610). As a result, the burglary was not executed on that occasion (Tr. 610). The next day, Meade and Gentry explained to the petitioner that the burglary had been aborted and Meade told the petitioner that they would steal the films later (Tr. 268). As it happened, however, Gentry burglarized the warehouse a month later solely on his own initiative without any prior consultation with petitioner.

As a result of the Chicago transaction, the petitioner was charged, in count two of the indictment, with aiding and abetting the interstate transportation of stolen goods, in violation of 18 U.S.C. §§2, 3 and 2314. This count was dismissed by the government at trial. In count three the petitioner was charged with the receipt of these stolen films of a value in excess of $5,000.00, which films were moving as and part of interstate commerce, in violation of 18 U.S.C. §§2 and 2315. His defense to this charge was that the films that were stolen did not have an aggregate value

in excess of $5,000.00, an issue which was hotly contested in the trial court. He was convicted on that count, however. The petitioner was also convicted on count four of the indictment, which charged him with the interstate transportation of obscene films from Chicago to Cedar Rapids, in violation of 18 U.S.C. §§2 and 1465. Additionally, the conspiracy count, upon which the petitioner was convicted, alleged that the petitioner had conspired to commit federal offenses pertaining to the Chicago films.

C. Searches and Seizures

Crucial evidence obtained by two searches and seizures was introduced at petitioner's trial following the denial of the petitioner's pretrial motion to suppress such evidence.

1. Exhibit 79

Government's Exhibit 79 was a written inventory of certain adult films located in the petitioner's warehouse. This document was stolen from the petitioner by Thomas Meade and delivered by him to the Iowa BCI. At the time of the theft by Meade of this document he was acting as an agent and informant for the state (Tr. 623). The reason that he pilfered the document was, in his own words:

> " . . . I can't say I knew, but I suspected these were the films from Chicago and I decided to get that list, figuring that it would be helpful to [the BCI]." (Tr. 623).

The government argued at trial that, indeed, Ex. 79 was a list of the films stolen in the Chicago transaction.

At the hearing on the petitioner's motion to suppress, BCI Agent Marlin testified that Meade had contacted him in the middle of November and that an agreement between the BCI, the Iowa State Attorney General's office and Meade had been executed, under the terms of which Meade

received immunity for certain crimes in exchange for his gathering and providing information on the activities of the petitioner. Meade began working for the BCI on November 19, 1974. (Tr. 4-5, Supp. Hear.). Thereafter, Meade, without a seizure warrant, stole from petitioner the inventory list that was subsequently introduced at petitioner's trial as government exhibit 79. Agent Marlin was unable to recall the circumstances under which the stolen document was delivered to the BCI. He did testify, however, that Meade's grant of immunity was conditioned on his "getting the goods on Wedelstedt." (Tr. 11, Supp. Hear.). Meade was to "gather" information on the petitioner's criminal activities, including the petitioner's activities concerning the Chicago transaction about which Meade and Agent Marlin had spoken (Tr. 6, 11-12, Supp. Hear.). Indeed, in response to a government question as to whether Meade was " . . . to gather information or gather evidence and documents and such as that sort," Agent Marlin responded, "if he could." (Tr. 12, Supp. Hear.).

The district court overruled the petitioner's motion to suppress exhibit 79, however, on the ground that Meade's actions were not attributable to the state.

2. Exhibits 54-78

Government exhibits 54 through 78 were the sexually oriented films upon which the charges against petitioner arising out of the Chicago transaction were based. They were seized under a state warrant issued by an Iowa District Court on December 15, 1974. (See Exhibits 2A through 2I). Agent Marlin had used the document stolen by Meade to assist him in obtaining this warrant.

At the post-seizure statutory hearing provided by Iowa law, the Iowa District Court determined that the warrant it had issued in respect to the seizure of exhibits 54-78 was

defective in that it was not based upon probable cause. Accordingly, that court ordered the property returned to the petitioner (Ex. 2I). Instead, the state released the property to the federal grand jury pursuant to a subpoena.

That portion of the affidavit concerning Exhibits 54 through 78 reads as follows:

> "On or about the 8th of December, 1974, a theft occurred in Chicago, Illinois, where, more than 1000 8 milimeter [sic] pornographic films were stolen from a warehouse. Meade was originally asked by Wedelstedt to take part in this theft but did not do so. These films have since been observed by Meade at the warehouse at 311 9th Ave., S.E., Cedar Rapids, Iowa. This theft was done at the direction of Wedelstedt, by his employees. This affiant overheard a conversation between Meade and Wedelstedt on the ____ day of December, 1974, where Meade said 'how come you ripped off the films without me' and Wedelstedt said 'I gave you a chance and you didn't want to do it.' Meade then said 'did you give them (Meaning the thieves) $2 a film as our deal was' and the remainder of that portion of the conversation was unintelligible. A complete list of those films is attached hereto marked Exhibit B."

Testimony at the state forfeiture hearing and the suppression hearing in the district court below demonstrated that the source of all information or conclusions in the affidavit, except for the overheard conversation by the affiant, was the BCI informer Meade, who had no personal knowledge of the commission of the alleged theft.

The district court overruled the petitioner's motion to suppress the evidence obtained under this warrant.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD RESOLVE THE CONFLICT THAT EXISTS AMONG THE CIRCUIT COURTS OF APPEAL AS TO WHETHER REVERSAL OF A CONSPIRACY CONVICTION IS REQUIRED WHEN A GENERAL JURY VERDICT IS RETURNED ON A COUNT ALLEGING A MULTIPLE OBJECTIVE CONSPIRACY AND IT IS LATER DETERMINED THAT ONE OF THE OBJECTIVES CHARGED DOES NOT CONSTITUTE A FEDERAL OFFENSE.

Count one of the indictment brought against the petitioner alleged a multiple objective conspiracy: (1) interstate transportation of stolen goods valued at more than $5,000.00 (18 U.S.C. §2314); (2) receipt, concealment, storage, sale and disposition of stolen goods valued at more than $5,000.00 which moved as, were part of and constituted interstate commerce (18 U.S.C. §2315); and (3) interstate transportation of obscene materials for the purpose of sale and distribution (18 U.S.C. §1465). The first count also alleged that the conspiracy to commit the above federal offenses was related to two separate thefts: (a) the theft of a private classic film collection from Davenport, Iowa ("Shepard transaction"); and (b) the theft of allegedly obscene films from a warehouse in Chicago, Illinois ("Chicago transaction"). The remaining four counts charged as substantive crimes those crimes which were alleged as part of the conspiracy, count five being the only substantive count which concerned the Shepard theft.

Prior to trial, the petitioner moved to dismiss and sever all counts of the indictment or portions thereof which concerned the Shepard transaction on the ground that

petitioner would be severely prejudiced by the introduction of evidence concerning the Shepard transaction, which was not a federal crime but only a state crime, because it was wholly intrastate in character. In response to petitioner's pretrial motions and the government's concession that there was no proof that the Shepard films had ever left Iowa, the trial court dismissed count five and a portion of count one (Tr. 3-4). However, after objection by the government to the dismissal of the portion of count one concerning the Shepard transaction, the trial court reinstated the dismissed portion and overruled that part of petitioner's motion to dismiss or sever (Tr. 9). Petitioner continued to object to the inclusion of the Shepard transaction in the trial. Petitioner's motions for acquittal and mistrial because of prejudicial joinder in connection with the Shepard transaction (Tr. 694-697) were overruled at the close of the government's case (Tr. 736) and at the close of all evidence (Tr. 785).

After deliberation, the jury returned general verdicts of guilty on the remaining counts of the indictment, counts one, three and four.[4] The general guilty verdicts on counts three and four, from the facts developed prior to trial and at trial, clearly related only to the theft in Chicago. However, it was impossible to ascertain from the jury's general verdict on count one the basis of the jury's determination of guilt on that count.

On appeal of his convictions to the Eighth Circuit Court of Appeals, petitioner attacked his conviction of conspiracy

[4] Count two (which charged petitioner with aiding and abetting the interstate transportation of the stolen pornographic films from Chicago) was dismissed upon motion of the government during the course of the trial.

on the ground that the Shepard transaction, upon which the jury was free to base its verdict of guilty on the conspiracy count, did not constitute a violation of federal law, either as a substantive offense or as a conspiracy. However, the Eighth Circuit rejected this argument without reaching the question of whether the Shepard transaction constituted a conspiracy to violate federal law.

Instead, the court of appeals held that since the Chicago transaction, which had been joined with the Shepard transaction under a single conspiracy count, *did* constitute a federal offense and since the jury convicted the petitioner on the two substantive offenses which concerned the Chicago transaction, it could be assumed that the jury properly found the petitioner guilty of a conspiracy to violate federal laws with respect to the Chicago transaction. Assuming that to be the case, the court held, there was no danger that the jury had found the petitioner guilty of a conspiracy to violate federal laws based solely upon his involvement with the Shepard transaction, which, the court conceded, may well have been a non-federal offense. However, the speculation by the court of appeals as to what was in the jury's mind when it returned a verdict of guilty on the conspiracy count is just that—speculation. There is simply no way to exclude the real possibility that the petitioner was convicted of conspiracy to violate federal law based solely upon the Shepard transaction, which, the petitioner submits, did not constitute a conspiracy to violate any federal law.[5]

The likelihood that this did, in fact, occur is substantial, in view of the overwhelming amount of evidence that was

[5] Indeed, in its final argument to the jury on the conspiracy count, the government strenuously urged the jury to convict on that count on the basis of the Shepard transaction (Tr. 901-911).

introduced concerning the Shepard transaction, all of which, the jury was told, related only to the conspiracy charge before it. Indeed, the court of appeals recognized that a "considerable amount" of evidence relating to the Shepard transaction was introduced to support the conspiracy count. In fact, during the trial, the government introduced more testimony pertaining to the Shepard transaction than it offered relating to the Chicago transaction. Thus, it is by no means unlikely that the jury based its verdict on count one on the Shepard transaction and not on the Chicago transaction.

The court of appeals, by assuming that such was not the case, and by concluding that proof of one of several objects of a conspiracy is sufficient to sustain a conviction even where there is a failure of proof of another object or when one of the objects charged does not constitute a federal offense, was able to avoid its own misgivings that there was no interstate nexus in the Shepard transaction to constitute a federal violation. Indeed, the court of appeals recognized that the Shepard transaction involved "the solely intrastate transfer" of films, "separate and distinct from the proof of the Chicago conspiracy."

The record is clear that the Shepard films were stolen from a residence in Davenport, Iowa, transported to Cedar Rapids, Iowa, and then to Cedar Falls, Iowa. The films *never* left the State of Iowa. Moreover, the record also reflects that the petitioner never agreed to transport, or aid, or plan, or in any way conspire in the transportation of the Shepard films in interstate commerce, nor did any of the petitioner's alleged co-conspirators. The record only shows that the petitioner agreed to transport the Shepard films *intrastate* to Cedar Falls, Iowa to sell the films to a

prospective buyer and, further, that the petitioner had reason to believe that the fictitious west coast buyer would transport the films out of state. However, the record did not reflect, nor did the indictment charge, that the petitioner conspired with the "buyer" to transport the films in interstate commerce. Rather, the record reflected and the indictment charged that the petitioner conspired with Gentry to turn over complete possession of the films to the buyer in Iowa.

The petitioner was not charged with conspiring with the "buyer" to transport the films out of state. Nor was such a charge possible, because here there was no joint objective between the buyer and the seller. A buyer's purpose is to buy; a seller's purpose is to sell. Absent any further agreement between a buyer and a seller, no conspiracy exists. *United States v. Ford,* 324 F. 2d 950 (7th Cir. 1963); *United States v. Zeuli,* 137 F. 2d 845 (2nd Cir. 1943); *See also, Pinkerton v. United States,* 328 U.S. 640, 643 (1946), *reh. denied,* 329 U.S. 818 (1946); *Baker v. United States,* 393 F. 2d 604 (9th Cir. 1968), *cert. denied,* 393 U.S. 836 (1968); *Reno v. United States,* 317 F. 2d 499, 503-504 (5th Cir. 1963), *cert. denied,* 375 U.S. 828 (1963). Clearly the Shepard transaction did not involve a conspiracy to commit a federal crime.

As a consequence, the Eighth Circuit's holding—that proof of one objective concerning the Chicago transaction sustained the conspiracy conviction notwithstanding the failure of proof on another objective of the conspiracy—while consistent with rulings by the Second and Sixth Circuits[6] is in conflict with rulings by the Third, Fifth and Ninth

[6] *United States v. Dixon,* 536 F. 2d 1388, 1401-1402 (2nd Cir. 1976); *United States v. Papadakis,* 510 F. 2d 287, 297 (2nd Cir. 1975), *cert. denied,* 421 U.S. 950 (1975); *Moss v. United States,* 132 F. 2d 875, 878 (6th Cir. 1943).

Circuits.[7] Moreover, the Seventh Circuit appears to have an intra-circuit conflict.[8]

In light of the clear conflict among the circuit courts of appeal on this important question of law presented by this case, this Court should grant a writ of certiorari to decide whether a reversal of a conspiracy conviction is required when a general jury verdict is returned on a count alleging a multiple objective conspiracy and it is later determined that one of the objectives charged does not constitute a federal offense. The importance of this question is highlighted by the increasing frequency with which indictments are being returned charging multiple objective conspiracies to violate federal laws and by the recurring nature of this problem, as evidenced by the plethora of decisions by the lower courts who have had to grapple with this question. The petitioner, therefore, urges this Court to accept this case for review and reverse his conviction.

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[7] *United States v. Tarnopol*, 561 F. 2d 466, 475 (3rd Cir. 1977); *United States v. Dansker*, 537 F. 2d 40, 51 (3rd Cir. 1976); *Van Liew v. United States*, 321 F. 2d 664, 672 (5th Cir. 1963); *United States v. Carman*, 577 F. 2d 556, 566-568 (1978); *Samuel v. United States*, 169 F. 2d 787, 798 (9th Cir. 1948).

[8] *Compare, United States v. Baranski*, 484 F. 2d 556, 560-561 (7th Cir. 1973) with *United States v. Tanner*, 471 F. 2d 128, 140 (7th Cir. 1972), *cert. denied*, 409 U.S. 949 (1972).

II.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL BY THE JOINDER IN A SINGLE INDICTMENT OF CHARGES STEMMING FROM TWO SEPARATE TRANSACTIONS, ONE OF WHICH DID NOT CONSTITUTE A FEDERAL OFFENSE AND WHICH, IN ANY EVENT, WAS SEPARATE AND DISTINCT FROM THE OTHER TRANSACTION.

Prior to trial and throughout the trial, the petitioner attacked the introduction of evidence concerning the receipt by the petitioner of classic films stolen from the Shepard residence in Davenport, Iowa. In pretrial motions to dismiss and to sever, the petitioner raised the improper joinder of the non-federal Shepard crime in counts one and five. In response to those motions, the trial court ultimately dismissed count five (Tr. 3-4), but allowed the allegations of the Shepard transaction in the count one conspiracy to remain (Tr. 9). At trial, petitioner's motions for acquittal and for mistrial, based on joinder of the non-federal Shepard transaction, were overruled (Tr. 736, 785).

On appeal, the Eighth Circuit rejected the petitioner's argument of prejudicial joinder in a footnote to its holding that the general verdict of guilty on the count one conspiracy could be sustained in spite of the possible joinder of a non-federal crime. In so holding, the court disregarded the *caveat* recognized by several of the circuit courts of appeal—which it had cited—to the effect that the introduction of "an overwhelming amount of evidence relevant only to the unproved part of the conspiracy may have prejudiced the jury." *United States v. Papadakis*, 510 F. 2d 287, 297 (2nd Cir. 1975), *cert. denied*, 421 U.S. 950 (1975); *United States v. Mackey*, 571 F. 2d 376, 387 n. 14 (7th Cir. 1978);

Cf. United States v. Dansker, 537 F. 2d 40, 52 (3rd Cir. 1976).

In the trial below, an overwhelming amount of evidence, certainly more than half of all the testimony introduced at trial, concerned the Shepard transaction. Indeed, the court of appeals agreed that "a considerable amount of evidence relevant to the Shepard transaction was introduced. . . . "

If, as the petitioner submits, the Shepard transaction was not a federal offense, then the district court erred in overruling petitioner's motions for dismissal and acquittal of all charges stemming from the Shepard transaction. Furthermore, in such case, the district court erred in overruling petitioner's motion for mistrial on the Chicago charges, trial of which had been improperly and unfairly influenced by the vast quantity of evidence improperly introduced pertaining to the non-federal Shepard offense.

Even if it were determined that the Shepard transaction constituted a federal offense, however, reversal would still be required because of the improper joinder of the Shepard transaction with what the court of appeals characterized as the separate and distinct Chicago transaction. Petitioner was severely prejudiced by the introduction of the overwhelming amount of evidence concerning the improperly joined Shepard transaction at the same trial on the charges stemming from the Chicago transaction. The prejudice to petitioner was particularly severe in view of the fact that many of the issues to be resolved by the jury were highly sophisticated and complex:

(1) whether the goods in question had a value in excess of $5,000.00, as required by 18 U.S.C. §2315;

(2) whether the Chicago films were obscene as required by 18 U.S.C. §1465;

(3) whether the Shepard transaction had a sufficient interstate nexus to warrant a finding that it was a federal crime;

(4) whether any conspiracy in which the petitioner had been involved concerning the Chicago transaction had been abandoned prior to the theft of the Chicago films.

Moreover, petitioner's defenses raised none of the questions which could have permitted introduction of evidence concerning the Shepard transaction as other crimes, wrongs, or acts pursuant to Rule 404(b) of the Federal Rules of Evidence.

Because of the nature of this case, juror confusion between evidence of the Shepard transaction and evidence of the Chicago transaction was highly probable and clearly prejudicial. Therefore, the petitioner urges this Court to review his conviction and reverse on the ground that he was denied a fair trial by the joinder of the Shepard transaction with the Chicago transaction.

III.

THIS CASE PRESENTS IMPORTANT QUESTIONS AS TO WHETHER AN UNLAWFUL SEIZURE BY A CITIZEN ACTING AS A POLICE INFORMANT AND AGENT IS ATTRIBUTABLE TO THE STATE AND AS TO WHAT STEPS MUST BE TAKEN BY A DEFENDANT TO PRESERVE HIS OBJECTION TO THE ADMISSION OF ILLEGALLY SEIZED EVIDENCE.

A. The Theft By Police Informant Meade Was Attributable To The State And Therefore Violated The Fourth And Fourteenth Amendments.

On December 12, 1974, government informant Meade stole from the petitioner and immediately brought to the BCI an inventory list of over 1300 adult films stored in petitioner's warehouse. This inventory list was subsequently introduced at the petitioner's trial by the government as Exhibit 79. It was the government's theory that this exhibit represented a complete list of the films stolen in the Chicago transaction. This evidence was extremely damaging to the petitioner because it was the most important piece of evidence offered by the government to prove essential elements of the conspiracy and receipt of stolen property charges arising out of the Chicago transaction—that the number of films stolen by Meade was large enough to warrant an inference by the jury that the aggregate value of the films exceeded $5,000.00, an issue that was hotly contested at trial. The petitioner argued at trial, *inter alia*, that, at most, each film was worth $7.00, in which case there had to have been at least 715 films stolen in the Chicago theft by Meade in order for the aggregate value of the films to exceed the $5,000.00 jurisdictional requirement (*See* Tr. 920-925). Exhibit 79 was extremely damaging because it contained a list of over *1300* films which the government claimed were the stolen Chicago films. The petitioner moved

to suppress this evidence prior to trial on the ground that the warrantless seizure of the inventory list by Meade, who was a paid government informant assigned the task of "getting the goods on Wedelstedt" (Tr. 11, Supp. Hear.), violated the Fourth and Fourteenth Amendments. This argument was rejected by both courts below, however, on the ground that Meade's conduct was not attributable to the state. The petitioner submits that the lower courts erred.

In *Byars v. United States*, 273 U.S. 28, 32 (1927), this Court held that the government will not be permitted to evade the prohibitions of the Fourth Amendment by "circuitous and indirect methods." Consequently, this Court has recognized that the proscriptions of the Fourth Amendment apply to searches and seizures by private individuals who, "in light of all the circumstances of the case" were acting as "instrument[s] or agent[s]" of the government. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971); *see also Lustig v. United States*, 338 U.S. 74 (1949); *Gambino v. United States*, 275 U.S. 310 (1927).

Examination of the totality of the circumstances of this case, as documented by the record, reveals that at the time of the unlawful seizure of Exhibit 79 by Meade, he was acting as an instrument or agent of the Iowa BCI. The record shows that on November 19, 1974, Meade struck a bargain with the BCI and the State Attorney General's office under which he would receive immunity for certain crimes in exchange for acting as an informant on the petitioner (Tr. 4-5, Supp. Hear.). According to the testimony of Agent Marlin, Meade's immunity was conditioned on "his getting the goods on Wedelstedt." (Tr. 11, Supp. Hear.). Marlin further testified that Meade was to gather evidence and information on the various criminal activities of the peti-

tioner, which included, but were not limited to, the activities pertaining to the Chicago transaction (Tr. 5-6, Supp. Hear.). In response to a question posed by the government, "Was [Meade] to gather information or gather evidence and documents and such as that sort?", Marlin answered, "If he could." (Tr. 12, Supp. Hear.).

The record discloses that from November 19, 1974, until approximately three or four weeks after the arrest of the petitioner, informant Meade continuously worked for the BCI and was in almost daily contact with BCI agents, receiving directions from them (Tr. 628). During this period, Meade received cash remuneration for the services he rendered for the BCI (Tr. 628, 657). Meade testified that his primary loyalty during this period was to the BCI and not to the petitioner, for whom Meade was also working (Tr. 629).

Further, Agent Marlin testified that while Meade was given some instructions on what to do,[9] he was also given wide latitude in carrying out his instructions:

> "Q. And you were instructing him [Meade] during the period of time, were you not, what to do and what not to do?
>
> A. In some instances I was. Others Meade played it by ear.
>
> Q. And both your instructions and what Meade played by ear was to obtain evidence against Mr. Wedelstedt. Isn't that true?
>
> A. Corroboration for what Meade had told me at our initial meeting." (Tr. 5-6, Supp. Hear.).

[9] For example, Meade was instructed to record surreptitiously his conversations with the petitioner.

Finally, according to Meade's testimony, less than a month after he began working for the BCI, he pilfered the inventory list from petitioner's warehouse and immediately turned it over to the BCI, which accepted the list without any objection and without any indication that he had done anything wrong:

> "Q. Did they tell you to take it back?
>
> A. No.
>
> Q. They kept it. Right?
>
> A. Yes, as far as I know.
>
> Q. They didn't tell you you had done something wrong either, did they?
>
> A. No." (Tr. 642).

Informant Meade gave the following reason for his theft of Exhibit 79: "I suspected these were the films from Chicago and I decided to get the list, figuring that it would be helpful to [the BCI]." (Tr. 623).

The totality of the circumstances in this case reveals that Meade's seizure of Exhibit 79 was not merely the act of a private individual devoid of any governmental encouragement, instigation or participation. Cf. *Burdeau v. McDowell*, 256 U.S. 465 (1921). To the contrary, the evidence reflects that the BCI had a heavy hand in the illegal seizure. *See Lustig v. United States, supra.* Indeed, it is obvious that without the arrangement between informant Meade and the BCI, no seizure would have ever taken place. This case is unlike *Coolidge v. New Hampshire, supra,* at 403 U.S. 487-489, where the petitioner's wife voluntarily gave the police evidence to help clear her husband. Informant Meade's cooperation was totally dependent upon a *quid pro quo* exchange of immunity for evidence incriminating the petitioner. Consequently, Meade was subject to "the

more subtle techniques of suggestion that are available to officials in circumstances like these." *Id.*, at 489.

Moreover, this case is unlike the situation where a private individual, with absolutely no connections with the government, wrongfully obtains evidence for his own particular purposes and then subsequently gives the evidence to the government in an effort to aid in the apprehension of criminals. *Compare Burdeau v. McDowell, supra,* at 236 U.S. 473-474, where the petitioner's former employer, in order to protect its own property, wrongfully seized evidence from petitioner and then several months later voluntarily turned the evidence over to the government.

In short, Meade was no ordinary private citizen trying to aid in the apprehension of criminals. He was a convicted felon who had been arrested and who was trying to make a deal to stay out of prison (Tr. 19-20, Supp. Hear., Tr. 625, 654). He agreed to gather information against the petitioner solely on the condition that he would be granted immunity (Tr. 625-628). Given the fact that the BCI conditioned Meade's grant of immunity upon "getting the goods on the [petitioner]" (Tr. 11, Supp. Hear.), and given the vague guidelines and wide latitude given to Meade to carry out this objective, the conclusion is inescapable that the BCI encouraged and, indeed, invited informant Meade to undertake the theft of Exhibit 79. *See Gambino v. United States, supra; United States v. Newton,* 510 F. 2d 1149 (7th Cir. 1975); *Knoll Associates, Inc. v. F.T.C.,* 397 F. 2d 530 (7th Cir. 1968); *United States v. Payne,* 429 F. 2d 169 (9th Cir. 1970); and *United States v. Stein,* 322 F. Supp. 346 (N.D. Ill., 1971). Under these circumstances, the warrantless seizure of the inventory list by Meade was attributable to the state.[10]

[10] This Court in another context has recognized that "only by sifting facts and weighing circumstances can non-obvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961). Thus, in determining state action in racial discrimination cases, this Court has looked to whether the government's action or inaction encouraged or fostered racial discrimination. *See Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972). In applying these principles by analogy to the context of determining whether Meade was an instrument or agent of the BCI, it becomes apparent that the BCI's actions and inactions in the instant case encouraged and fostered Meade's unlawful seizure, so as to constitute sufficient governmental participation in the seizure to attribute the seizure to the government. Cf. *Lustig v. United States, supra.*

This case presents an important question for this Court's review: may the police, by the simple expedient of promising a paid informant immunity for certain crimes if he is successful in "getting the goods" on a suspect, execute a successful end-run around Fourth Amendment protections? The petitioner respectfully urges this Court to accept this case for review and to answer "no" to that question.

B. The Petitioner Did Not Waive His Objection To The Introduction Of The Inventory List Seized By Informant Meade.

The court of appeals rejected the petitioner's argument that the inventory list had been illegally seized and should have been suppressed by the trial court on the alternative ground that the petitioner had waived his objection to the admission of this evidence by being the first party to interrogate a witness at trial on it and by stating "no objection" when the government offered it into evidence at trial. However, a review of the record in this case reveals that by no stretch of the imagination did the petitioner waive his Fourth Amendment objection to the admissibility of this extremely damaging evidence.

Petitioner, as required by Rule 41(f) and Rule 12(B)(3) of the Federal Rules of Criminal Procedure, timely filed a pretrial motion to suppress Exhibit 79. The petitioner

also filed an extensive brief in support of his motion to suppress. Two evidentiary hearings were held on petitioner's motion—one by a federal magistrate and the other by the district court. Thereafter, the district court, in an extensive order, denied petitioner's motion on the merits. Nowhere in either of the evidentiary hearings or in the trial court's order was there an indication that the trial court had reserved for trial any ruling on the admissibility of Exhibit 79.

After the district court's denial of his motion to suppress the inventory list, petitioner was placed in a position of having to use any available method to reduce the probative value of the inventory list, the admission into evidence of which was inevitable. Inasmuch as one of the petitioner's arguments was that an insufficient number of films had been stolen in the Chicago transaction by Meade to permit the jury to conclude that the aggregate value of the films exceeded $5,000.00, the petitioner had to establish that the inventory list which he knew would be admitted into evidence, did not, as the government contended, prove that over 1300 films were stolen in the Chicago transaction. In order to reduce the probative value of tainted evidence which he knew would be introduced, the petitioner had to establish that the inventory list contained many films which had not been stolen in the Chicago transaction. Accordingly, upon cross-examination of government witness David Hintermeister, the first witness called who had personal knowledge of the inventory list, the petitioner cross-examined the witness on matters relating to the inventory list to show that the witness had helped compile the inventory list and to show that the list included the names of numerous films other than those involved in the Chicago theft (Tr. 84-90). This was hardly a waiver of the petitioner's Fourth Amend-

ment objections to the admissibility of the inventory list; rather, it was an attempt to reduce the damaging effect of evidence which the petitioner had unsuccessfully attempted to suppress.

Moreover, the petitioner's statement that he had no objection when the government offered into evidence the inventory list was not a waiver of Fourth Amendment objections, but was merely an indication that, aside from the Fourth Amendment objection which had already been rejected, there was no other basis upon which the petitioner could urge the inadmissibility of the inventory list. This is confirmed by the fact that at the close of the government's case, at the close of all the evidence and in his motion for new trial, the petitioner renewed his motion to suppress on all grounds theretofore urged by him (Tr. 683, 849).

This Court has long recognized the general rule that a denial on the merits of a pretrial motion to suppress is enough to preserve the issue for appeal and renders it unnecessary to again object when such evidence is offered at the trial. *Lawn v. United States,* 355 U.S. 339, 353 (1958), *reh. denied,* 355 U.S. 967 (1958); *Gouled v. United States,* 255 U.S. 298 (1921); *see also United States v. Cruz,* 581 F. 2d 535 (5th Cir. 1978) *(en banc); Waldron v. United States,* 219 F. 2d 37 (D.C. Cir. 1955).

The Court of Appeals relied upon the exception stated in *Lawn v. United States, supra,* that the motion to suppress may be waived by a "conscious and intentional waiver." However, the facts in *Lawn v. United States, supra,* are clearly distinguishable from the facts in the instant case. In *Lawn,* the trial court expressly reserved ruling on the admissibility of the tainted evidence until trial, and the court admonished the parties that it would be incumbent upon them to object at that time or their objections would be waived. *Id.,* at 354.

In the present case, the trial court made a definitive ruling prior to trial that the inventory list was admissible. The petitioner was under no obligation to engage in the meaningless formality of renewing objections to the admissibility of the inventory list at the time of trial, nor was he obligated to refrain from attempting to reduce the probative value of this damaging evidence at trial in order to preserve for appeal his Fourth Amendment objections. This Court should accept this case for review and reject the exaltation of form over substance by the court of appeals by reversing the petitioner's conviction.

IV.

AN IMPORTANT QUESTION IS PRESENTED CONCERNING THE CONSTITUTIONAL SUFFICIENCY OF A SEARCH WARRANT AFFIDAVIT WHICH CONSISTS MAINLY OF BALD CONCLUSIONS DRAWN BY A POLICE INFORMANT.

On December 15, 1974, BCI Agent Marlin applied to a state court judge for the issuance of a search warrant to search the petitioner's warehouse for the stolen adult films involved in the Chicago transaction. (See Government Exhibit 2A-2I). The warrant was issued by Judge Vietor on December 15, 1974, and the warrant was executed on December 16, 1974. Under the warrant, BCI agents seized approximately 1300 adult films which were listed in the inventory list that had been stolen from petitioner by informant Meade and attached to the search warrant. (See Government Exhibit 2D). These films were subsequently introduced at petitioner's trial as government exhibits 54-78.

On January 17, 1975, Judge Vietor, in a state forfeiture hearing, reversed his previous determination that Agent

Marlin's affidavit supported a finding of probable cause to issue the warrant and found that the warrant had been improperly issued. In the district court, the petitioner moved to suppress the evidence seized under the warrant, but his motion was overruled. The district court held, as did the court of appeals, that Agent Marlin's affidavit supported a finding of probable cause, the contrary determination of the state court that issued the warrant notwithstanding.

A common sense interpretation of Agent Marlin's affidavit, however, *see United States v. Ventresca,* 380 U.S. 102 (1965), demonstrates that the affidavit failed to set forth sufficient underlying facts and circumstances to support a finding of probable cause as required by this Court in *Aguilar v. Texas,* 378 U.S. 108 (1964) and in *Spinelli v. United States,* 393 U.S. 410 (1969).

The basic allegations of the affidavit are as follows:

(1) A theft of more than 1000 8 millimeter films took place in Chicago, Illinois on or about December 8, 1974;

(2) Informant Meade had originally been asked to take part in this theft but he did not do so;

(3) Meade observed these films at the petitioner's warehouse;

(4) Petitioner directed the theft by his employees;

(5) A complete list of the films was attached and marked Exhibit B; and

(6) Affiant overheard a part of the following conversation:

Meade: How come you ripped off the films without me?

Petitioner: I gave you a chance and you didn't want to do it.

Meade: Did you give them (Meaning the thieves) $2 a film as our deal was? (The rest of the conversation was unintelligible).

Testimony at the state forfeiture hearing and the suppression hearing in the district court below demonstrated that the source of all information and conclusions in the affidavit, except for the overheard conversation by the affiant, was BCI informer Meade. Thus, Meade was the source of all information summarized above in paragraphs one through five. Each of these allegations was nothing more than a bald conclusion unsupported by any of the underlying facts or circumstances upon which Meade based his conclusions that a theft had been committed and that the films were being secreted at petitioner's warehouse.

The theft of the Chicago films had never been officially reported and no facts were set forth in the affidavit to support the conclusory allegation that a theft had occurred. Indeed, Meade, who was the source of the information that a theft had occurred, had not participated in the theft and had no personal knowledge that a theft had, in fact, occurred. Indeed, Meade, who was the source of the information that a theft had occurred, had not participated in the theft and had no personal knowledge that a theft had, in fact, occurred. Certainly, the statement that Meade had been asked to steal the films, but did not do so, failed to establish that someone else did steal the films or that any theft had occurred.

Moreover, Meade's personal observation of films did not establish that a theft had taken place, or that the films he observed were stolen. As an employee of a business selling

adult films, Meade routinely observed large quantities of adult films in the warehouse. There was nothing to differentiate the films he observed and claimed were stolen from all of the other films in the warehouse and certainly nothing identifying those films as stolen merchandise. Thus, Meade's mere observation of films, without additional facts showing the source of the films, could not support a finding of probable cause that the films were stolen.

In addition, the conclusion that the exhibit attached to the affidavit was a complete list of the stolen films was not established by the affidavit. The affidavit did not set forth any facts to connect this list to the theft of the films.

Finally, the recitation of facts overheard by the affiant did not save the warrant. Standing alone, this recitation of facts was meaningless and could not have established probable cause. Under these circumstances, the state court was correct when it determined that the affidavit failed to establish probable cause. Accordingly, the courts below should have suppressed the films seized pursuant to the search warrant.

Furthermore, the inventory list that had been unlawfully seized by informant Meade played a substantial role in obtaining the search warrant. The inventory list was attached to the affidavit in support of the warrant and was described as being a list of the films whose seizure was sought. Without that inventory list, there clearly would not have been probable cause for the issuance of the warrant. Just as importantly, without the inventory list of films, no warrant could have been drafted which would have satisfied the Fourth Amendment's requirement that a warrant particularly describe the things to be seized. *See Stanford v. Texas,* 379 U.S. 476 (1965); *Andresen v. Maryland,* 427 U.S. 463 (1976). Only the inventory list differ-

entiated the allegedly stolen films from all of the other similar films located at petitioner's warehouse.

Under these circumstances, the search warrant in this case was the fruit of, and tainted by, the prior unlawful seizure by Meade of the inventory list. For this reason as well, the petitioner's motion to suppress the evidence seized under the warrant should have been granted. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Wong Sun v. United States,* 371 U.S. 471 (1963). The petitioner urges the Court, therefore, to grant certiorari and reverse his conviction.

V.

AN IMPORTANT QUESTION IS PRESENTED CONCERNING THE PROPRIETY OF A DISTRICT COURT'S REFUSAL, IN A FEDERAL OBSCENITY PROSECUTION, TO INSTRUCT THE JURY THAT THE PATENT OFFENSIVENESS PRONG OF THE TEST FOR OBSCENITY IS TO BE JUDGED BY REFERENCE TO CONTEMPORARY COMMUNITY STANDARDS.

The district court's instructions to the jury in this case on the definition of obscenity to be applied in assessing the petitioner's guilt or innocence on the charges of aiding and abetting the interstate transportation of obscene films, and conspiring to do so, began as follows:

> "In determining whether the Chicago films in this case are obscene, the basic guidelines for the jury are:
>
> A. Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest,
>
> B. Whether the work depicts or describes sexual conduct in a patently offensive way, and

> C. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
>
> If the predominant appeal of the pictures in question here, taken as a whole, is an appeal to the normal interest in sex of the average person, the jury should acquit the accused." (Tr. 952-953).

Following this instruction, the district court elaborated, separately, on each of the three prongs of the obscenity test it had recited to the jury (Tr. 953-956). With respect to the first guideline, the district court explained to the jury what was meant by the term "contemporary community standards" by which the jury was required to determine whether the films in question appealed to the prurient interest (Tr. 953-955). The district court then gave the following instruction pertaining to the second prong of the obscenity test:

> "The second guideline for obscenity is that it be shown that the publication depicts or describes sexual conduct in a patently offensive way. 'Patently offensive' means clearly offensive. The following are examples of patently offensive descriptions of sexual conduct: Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, also patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of genitals." (Tr. 955).

The petitioner objected to the district court's instructions on the definition of obscenity on the ground that nowhere in those instructions did the court instruct the jury to apply contemporary community standards in determining whether the films depicted or described sexual conduct in a patently offensive way (Tr. 820-821). This objection

was overruled, however (Tr. 873). Further, the petitioner requested that the court give the following instruction to the jury concerning the second prong of the obscenity test:

> "The second requirement for obscenity is that the average person, *applying contemporary community standards,* would find that the films depict or describe sexual conduct in a patently offensive way." (Tr. 821) (Emphasis added).

The district court refused to give this instruction, however (Tr. 873). As a result, the jury was given no standard by which to determine whether the films at issue were patently offensive. This was clearly reversible error.

In *Miller v. California,* 413 U.S. 15 (1973), *reh. denied,* 414 U.S. 881 (1973), this Court made it clear that *both* the first and second prongs of the test for obscenity—appeal to prurient interest *and* patent offensiveness—are to be judged by reference to contemporary community standards:

> "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, *but this does not mean that there are, or should or can be fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and to diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation,* even assuming the prerequisite consensus exists." *Id.,* at 413 U.S. 30 (Emphasis added).

In *Smith v. United States,* 431 U.S. 291, 301 (1977), this Court reiterated that principle:

> "The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. *The Miller opinion indicates that patent offensiveness is to treated in the same way.*" (Cites and footnote omitted; Emphasis added).

In the present case, the trial court refused to instruct the jury to apply contemporary community standards in considering whether the films were patently offensive. This clear error was terribly prejudicial to the petitioner, whose primary defense to the obscenity charge was that the films were not offensive to prevailing community standards in Iowa, in view of the fact that the Iowa legislature had deregulated the dissemination of obscene materials to consenting adults. *Compare Smith v. United States, supra.*

The Court of Appeals found no error in the district court's instructions on obscenity in this case because, in that court's view, the district court's instructions conveyed to the jury that the determination of obscenity is not a matter of individual taste but must be judged according to the community standards. However, the district court's instructions made abundantly clear to the jury the fact that contemporary community standards were to be applied *only* in considering the first prong of the obscenity test, the appeal to prurient interest. As to the patent offensiveness test, the district court gave examples of what would be patently offensive without giving the jury any freedom to apply contemporary community standards in determining patent offensiveness. The instruction effectively informed the jury that if the films at issue depicted ultimate sexual

acts, then the second prong of the test had been met. This deprived the petitioner of a primary defense, that the films were not patently offensive to prevailing community standards as expressed by the Iowa legislature.

Because of the clearly erroneous and prejudicial instruction on obscenity, the petitioner urges this Court to accept this case for review and to reverse his conviction.

VI.

AN IMPORTANT QUESTION IS PRESENTED CONCERNING THE EVIDENCE NECESSARY TO SUPPORT A CONVICTION FOR AIDING AND ABETTING THE INTERSTATE TRANSPORTATION OF OBSCENE MATERIALS, UNDER 18 U.S.C. §§2 AND 1465.

Count four of the indictment against the petitioner charged him with aiding and abetting the interstate transportation of obscene materials, the Chicago films, from Chicago, Illinois to Cedar Rapids, Iowa on December 8, 1974. The government's own evidence conclusively established, however, that Gentry, upon his own initiative and unaided in any manner by the petitioner, decided to burglarize the Chicago warehouse in December, 1974 and to transport the films stolen by him there to Iowa where he would attempt to sell them to the petitioner. Gentry enlisted the aid of two of his friends in St. Louis, Missouri, Leone and Dobler, to assist him in his criminal enterprise. Neither Leone nor Dobler even knew the petitioner. The three of them planned and executed the theft and subsequent interstate transportation of the stolen films wholly on their own without any assistance, consultation or participation by the petitioner. Indeed, the petitioner had no knowledge whatsoever of the theft and subsequent interstate transportation of the allegedly obscene films until after the crimes had been committed. Under these circumstances, the petitioner's motion for judgment of acquittal on the charge of interstate transportation of obscene films should have been granted by the district court.

It is firmly established that before an accused may be convicted of aiding and abetting a crime, there must be proof that he associated himself with the criminal venture, that he participated by his conduct in some fashion in its commission and that he sought by his actions to make the criminal venture succeed. *See Nye E. Nissen v. United States,* 336 U.S. 613 (1949); *United States v. Longoria,* 569 F. 2d 422 (5th Cir. 1978); *United States v. McMahon,* 562 F. 2d 1192 (10th Cir. 1977); *United States v. Licursi,* 525 F. 2d 1164 (2nd Cir. 1975). A charge of aiding and abetting requires proof of "specific intent to facilitate the commission of a crime by another." *United States v. Prince,* 529 F. 2d 1108, 1112 (6th Cir. 1976), *cert. denied sub nom., Pandelli v. United States,* 429 U.S. 838 (1976), quoting from *United States v. Bryant,* 461 F. 2d 912, 920 (6th Cir. 1972). In the present case, the petitioner simply had no involvement whatsoever with the interstate transportation of the films stolen by Gentry, Leone and Dobler in December, 1974.

In rejecting the petitioner's argument that he was entitled to an acquittal as a matter of law on this charge, the courts below relied upon the petitioner's role in inducing an earlier unsuccessful attempt by Meade and Gentry to burglarize the same Chicago warehouse. In particular, the lower courts relied upon Meade's statement to the petitioner following this unsuccessful attempt that they would try to secure the films later, to which statement the petitioner responded, "okay". (Tr. 269). The reliance by the lower courts on this earlier episode was misplaced, however.

After the aborted attempt to burglarize the Chicago warehouse, Gentry left the petitioner's employ and returned to his hometown of St. Louis, Missouri (Tr. 770). Because he needed money, he decided, without any consultation with the petitioner or instigation by him, to steal the Chicago films in order to make some money (Tr. 270). He enlisted the aid of Leone and Dobler and planned the theft not to comply with any request or order of his former employer, the petitioner, but for his own individual purposes (Tr. 270). He planned and executed the theft and subsequent interstate transportation of the films completely independent of the petitioner, who had no knowledge that his former employee, who had returned to St. Louis, was going to burglarize the Chicago warehouse. The petitioner in no way associated himself with the criminal venture of December, 1974 alleged in the indictment, he in no way controlled it, induced it or participated in it, and he engaged in no conduct whatsoever by which he sought to make the crime charged in count four of the indictment succeed. The lower courts erred in refusing to enter judgment of acquittal in favor of the petitioner on this charge. The petitioner, therefore, urges this Court to review and reverse his conviction.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

Title 18, U.S.C., Section 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

Title 18, U.S.C., Section 3

§ 3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

Title 18, U.S.C., Section 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S.C., Section 1465

§ 1465. Transportation of obscene matters for sale or distribution

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

Added June 28, 1955, c. 190, § 3, 69 Stat. 183.

Title 18, U.S.C., Section 2314

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

As amended May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87–371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90–535, 82 Stat. 885.

Title 18, U.S.C., Section 2315

§ 2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

As amended Oct. 4, 1961, Pub.L. 87–371, § 3, 75 Stat. 802.

SUPREME COURT
OF THE UNITED STATES

No. A-666

EDWARD JOSEPH WEDELSTEDT,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 10, 1979.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 27th
day of January, 1979.

Order Of The Eighth Circuit Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1978

77-1965

UNITED STATES OF AMERICA,

Appellee,

vs.

EDWARD JOSEPH WEDELSTEDT,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

January 9, 1979

Judgment And Opinion Of The Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1965

UNITED STATES OF AMERICA,

Appellee,

v.

EDWARD JOSEPH WEDELSTEDT,

Appellant.

Appeal from the United States District Court
for the Northern District of Iowa

Submitted: September 11, 1978

Filed: December 15, 1978

Before:

Ross and HENLEY, *Circuit Judges,* and
MARKEY,* *Chief Judge.*

Ross, *Circuit Judge.*

Edward Joseph Wedelstedt, appellant herein, was convicted in September 1977 on three counts of a five count

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1] Appellant Wedelstedt was sentenced as follows: a five year term of imprisonment on count one; a five year term on count three, to run concurrently with count one; a three year term on count four, to run concurrently with counts one and three. Additionally, a $2,500 fine was imposed under count four, and a $5,000 fine under count one.

indictment.[1] His offenses relate generally to his dealings in stolen movie films, both pornographic and nonpornographic. The evidence in the case has been described by the parties in terms of the two thefts—the "Shepard" transaction and the "Chicago" transaction.

A detailed explanation of the indictment is important in this case. Count one was a conspiracy count. It charged Wedelstedt with conspiring with three others, Bruce Gentry, Richard Dobler, and Dennis Leone, to commit various offenses against the United States between November 1, 1974 and December 16, 1974, at various named cities in Iowa, Illinois, and Missouri. The offenses which the conspirators were alleged to have agreed to commit were as follows: interstate transportation of goods of a value greater than $5,000, knowing the same to have been stolen, in violation of 18 U.S.C. § 2314; receipt, concealment, sale and disposition of goods of a value greater than $5,000 which "were a part of and constituted interstate commerce," knowing the same to have been stolen, in violation of 18 U.S.C. § 2315; the knowing transportation in interstate commerce, for sale and distribution, of obscene films in violation of 18 U.S.C. § 1465.

Eighteen overt acts in furtherance of the conspiracy were alleged under this count; although it is not completely clear, it appears that the first thirteen overt acts dealt with the "Chicago" transaction, and the last five with the "Shepard" transaction.

The remaining counts in the indictment, two through five, charged appellant with the commission of substantive offenses. In count two Wedelstedt was charged with aiding and abettting the interstate transportation of stolen goods (pornographic films from the "Chicago" transaction), in violation of 18 U.S.C. § 2314. This count was dismissed by the government during the course of the trial.

Count three charged appellant with the unlawful receipt and sale of stolen goods which were moving as, and were a part of, interstate commerce in violation of Sections 2 and 2315 (again, the "Chicago" films).

Count four charged the interstate transportation of obscene materials for purposes of distribution (the "Chicago" films) in violation of 18 U.S.C. §§ 2, 3, and 1465.

Count five related to the "Shepard" films, and charged the unlawful receipt, concealment, and sale of stolen goods which moved as a part of interstate commerce in violation of 18 U.S.C. §§ 2 and 2315. This count was also dismissed, on motion of defendant, for reasons which will be discussed later.

Prior to this federal prosecution, Wedelstedt had been convicted on state charges also arising out of the theft of the "Shepard" films.

The Shepard films were a collection of privately owned classic films. They were stolen in September 1974 in Davenport, Iowa from David Shepard and transported to Cedar Rapids, Iowa where they were received by appellant. They had been stolen and transported by Thomas Meade, who thereafter became an informer for the Iowa Bureau of Criminal Investigation (BCI), in exchange for immunity.[2]

Pursuant to a plan devised by Meade and the BCI, Meade informed Wedelstedt that he had located a buyer for the Shepard films; appellant thereafter arranged for the films to be transported in a U-Haul truck by his associates from one point in Iowa to another, where the alleged buyer was said to be waiting. Wedelstedt was told that the fictitious buyer, who was an agent, was from the West Coast, and would be transporting the films back there.

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[2] Meade was one of the employees in one of Wedelstedt's businesses, International Amusements.

The "Chicago" transaction involved the theft from a Chicago warehouse of a large number of pornographic, or adult films. This theft occurred on December 8, 1974; the three thieves were Gentry, Leone, and Dobler, mentioned previously in the conspiracy count. They transported the films to Cedar Rapids, Iowa and delivered them to the appellant Wedelstedt. An earlier attempt of the theft by Meade (the informer) and Gentry, on November 23, 1974, had been aborted. At the time of the "Chicago" transaction, Meade was already an informer. Gentry, Leone, and Dobler pleaded guilty to one count of conspiracy.

Counsel for the appellant has diligently raised numerous issues, thirteen in all, many of which will not require extended discussion by the court. We have carefully examined the issues, however, and conclude the conviction should be affirmed.

I. Shepard Transaction Conspiracy Count

The first three issues raised by appellant concern the "Shepard" transaction. The only count upon which appellant was convicted that concerns the "Shepard" transaction is count one, the conspiracy count.

Wedelstedt argues that the Shepard transaction as it occurred involved no violation of federal law, either as a substantive offenise under § 2315, or as a conspiracy to commit that offense. He objects to the lack of an interstate nexus, his argument being that these particular films never left the state, never entered interstate commerce, and only traveled between two points in Iowa.

On this basis, the trial court initially dismissed all counts emanating from the Shepard transaction—the count for the substantive crime (count 5), and that portion of the conspiracy count (count 1) which related to the Shepard

films. Later, however, the court reinstated the conspiracy count.[3]

Appellant's contention that an interstate nexus is lacking in the Shepard transaction is certainly not frivolous, but it is an allegation we feel it is unnecessary to reach in this case.

The conspiracy was alleged in a single count under the general federal conspiracy statute. Wedelstedt received but one sentence on that count, despite the fact that several illegal objects of the conspiracy, that is violations of several federal statutes, were allleged. Therefore, proof that Wedelstedt agreed to commit one of the multiple illegal objectives of the conspiracy sufficed to sustain the conviction on that count.

> It has always been the law that where an indictment alleges a conspiracy to commit several offenses against the United States, the charge is sustained by adequate pleadings and proof of conspiracy to commit any one of the offenses. (Citations omitted.)

United States v. James, 528 F.2d 999, 1014 (5th Cir.), *cert. denied,* 429 U.S. 959 (1976). *See also United States v. Mackey,* 571 F.2d 376, 387 n.14 (7th Cir. 1978); *United States v. Frank,* 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied,* 423 U.S. 1087 (1976). *But see United States v. Baranski,* 484 F.2d 556, 560-61 (7th Cir. 1973). Though this principle is usually applied in the context of a failure of proof as to one object of the conspiracy, it is as appli-

[3] The trial judge rejected the attempt to permit a substantive offense under § 2315 to be charged on these facts, and was unpersuaded, as are we, by the case the government continues to rely upon here, which construes a statute prohibiting the interstate transportation of firearms by a felon.

cable where one of the objectives charged is not a criminal act:

> In *United States v. Mack,* 112 F.2d 290 (2 Cir. 1940), this court, speaking through Judge Learned Hand, held that where an indictment charged a conspiracy to engage in three offenses and only one was proved, the conviction could still stand. We have recently followed that decision in *United States v. Papadakis,* 510 F.2d 287, 297 (2 Cir.), *cert. denied,* 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975), subject to a caveat not here applicable, and in *United States v. Frank,* 520 F.2d 1287, 1293 (2 Cir. 1975). Although in these cases all the objectives charged in the conspiracy count were crimes and the defect was a failure of proof as to some, other circuits have reached the same result when some of the objectives were not crimes, *Moss v. United States,* 132 F.2d 875 (6 Cir. 1943); *United States v. Tanner,* 471 F.2d 128, 140 (7 Cir.), *cert. denied,* 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 220 (1972). Although the Seventh Circuit, speaking through Judge Pell, has recently questioned the correctness of this line of authority on the ground that a reviewing court cannot tell what offense or offenses alleged in a conspiracy indictment were found by the jury, *United States v. Baranski,* 484 F.2d 556, 559-61 (1973), here we know from the conviction on Count II that the jury found that Dixon had committed the offense validly charged in the conspiracy count. Cf. *United States v. Bottone,* 365 F.2d 389, 394-95 (2 Cir.), *cert. denied,* 385 U.S. 974, 87 S.Ct. 514, 17 L.Ed.2d 437 (1966); *United States v. Jacobs,* 475 F.2d 270, 282-84 (2 Cir.), *cert. denied,* 414 U.S. 821, 94 S.Ct. 116, 131, 38 L.Ed.2d 53 (1973). There is thus no basis for questioning the conviction on the conspiracy count.

United States v. Dixon, 536 F.2d 1388, 1401-02 (2d Cir. 1976). *See also United States v. Tanner,* 471 F.2d 128, 139-40 (7th Cir.), *cert. denied,* 409 U.S. 949 (1972).

In this case three illegal objects were alleged: two clearly dealt only with the "Chicago" transaction; the other, a conspiracy to violate § 2315, could relate to either the "Shepard" or the "Chicago" thefts. Significantly, however, appellant Wedelstedt was also convicted of the *substantive* crime under section 2315 for the Chicago theft.

"The only caveat in such cases is that an overwhelming amount of evidence relevant only to the unproved part of the conspiracy may have prejudiced the jury." *United States v. Papadakis,* 510 F.2d 287, 297 (2d Cir.), *cert. denied,* 421 U.S. 950 (1975). In this case a considerable amount of evidence relevant to the Shepard transaction was introduced; this evidence, however, was separate and distinct from the proof of the Chicago conspiracy, which in any event formed the basis for most of the allegations in the conspiracy count. Wedelstedt does not challenge the sufficiency of the evidence to support the "Chicago" conspiracy allegations, and in fact the proof appears adequate. Accordingly, we sustain the count one conviction, and do not reach the federal issue presented by the solely intrastate transfer of the Shepard films.[4]

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[4] *Misjoinder of Offenses in the Indictment.*

Wedelstedt also alleges that the "Shepard" and "Chicago" offenses were improperly joined in the same indictment, and that evidence of the Shepard transaction improperly influenced the jury in convicting on the other counts. The indictment shows no facial misjoinder. "Where the evidence overlaps and the offenses are similar and occurred over a relatively short period of time, joinder is usually proper." *United States v. Riley,* 530 F.2d 767, 770 (8th Cir. 1976). *See also United States v. Hastings,* 577 F.2d 38, 40 (8th Cir. 1978). Wedelstedt "did not take the stand nor does he contend that he would have done so if the counts had been tried separately." *United States v. Lewis,* 547 F.2d 1030,

II. Petite Rule Violation and Take-Back Entrapment

Wedelstedt alleges first that the Department of Justice violated its internal rule on multiple state-federal prosecutions for conduct arising out of the same transaction, known as the Petite policy, and secondly, that this court should defer its decision here until the Iowa Supreme Court has had the opportunity to rule on Wedelstedt's claim of "take-back" entrapment, a legal defense recognized under Iowa law. The latter issue need not be addressed; the Iowa Supreme Court has ruled against Wedelstedt on the entrapment issue in the Shepard theft conviction. *State v. Wedelstedt,* 263 N.W.2d 894, 900-01 (Ia. 1978).

The Justice Department's violation of its own rule similarly does not merit a reversal of any count against Wedelstedt. The rule which originated in 1959 "indicated that both federal and state prosecutions should not be pursued without approval of the Attorney General." *United States v. King,* No. 78-1286, slip op. at 6 (8th Cir. Oct. 5, 1978). However, "[t]he enforcement of such policy, if still in effect, lies with the Attorney General and an individual defendant cannot avoid prosecution on the basis of this policy. No cases have been cited which support the right of an individual to seek a dismissal on the basis of the *Petite* policy." *Id.* In the instant case moreover appellant has not been prejudiced because we affirm his conviction on each count without reference to proof of the Shepard

1033 (8th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977). Reversal is required only when clear prejudice is shown. The evidence of guilt on the "Chicago" counts is sufficient, and the trial judge appropriately admonished the jury to consider each crime and the evidence pertaining to it separately. *See United States v. Jines,* 536 F.2d 1255, 1257 (8th Cir.), *cert. denied,* 429 U.S. 942 (1976).

offense. The Shepard count was the sole basis of the state conviction.[5]

III. Motion for Judgment of Acquittal on Count Four

Count four charged Wedelstedt with aiding and abetting the interstate transportation of obscene materials for sale or distribution (the Chicago films) in violation of 18 U.S.C. §§ 2, 3, and 1465.[6]

It is Wedelstedt's position that the evidence conclusively demonstrated his ignorance of the theft at the Chicago warehouse at the time that it occurred, and that he only subsequently learned that the films had been transported across state lines by Gentry, Dobler, and Leone.

It is axiomatic that:

> In assessing a motion for judgment of acquittal, either at the end of the government's case or after a jury verdict against the defendant, the evidence must be viewed in the light most favorable to the government. *Furthermore, the government must be given the*

[5] The Department of Justice approved the prosecution under its Petite policy, *ex post facto.* It based its approval on the fact that the defendant had been convicted in state court on charges which were only intrastate in character. If the United States Attorney had sought the required approval prior to trial it is probable that references to the Shepard transaction could have been eliminated in the proof of the conspiracy.

[6] § 1465. Transportation of obscene matters for sale or distribution

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> *benefit of all reasonable inferences favorable to its case that may logically be drawn from the evidence.*

United States v. Cline, 570 F.2d 731, 733 (8th Cir. 1978) (emphasis added). We have also said that "[a] motion for acquittal should be granted only where 'the evidence, viewed in the light most favorable to the Government, is such that a reasonably minded jury *must* have a reasonable doubt as to the existence of any of the essential elements of the crime charged.'" *United States v. White,* 562 F.2d 587, 589 (8th Cir. 1977).

In *United States v. Frye,* 548 F.2d 765 (8th Cir. 1977), where the crime was aiding and abetting the transportation of a check in interstate commerce in violation of § 2314, the court explained the principles which define the aiding and abetting offense:

> Generally speaking, to find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. As the term "aiding and abetting" implies, it asumes some participation in the criminal act in furtherance of the common design, *either before or at the time the criminal act is committed.* It implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient.
>
> *United States v. Jarboe,* 513 F.2d 33, 36 (8th Cir. 1975), *cert. denied,* 423 U.S. 849, 96 S.Ct. 90, 46 L.Ed.2d 71 (1976).

Id. at 768 (emphasis added). In sum, the government need show only that a defendant associated himself with a venture, and sought by his action to make it succeed. *United States v. Buttorff,* 572 F.2d 619, 623 (8th Cir.), *cert. denied,* 98 S.Ct. 3095 (1978).

Wedelstedt's principal contention is that he gave no direct assistance to the three thieves, nor did he do anything which could be inferred as an act of assistance. Specifically, Wedelstedt argues that all three principals testified that the theft was carried out without his knowledge, and that two of the principals had never met him until after the theft was accomplished.

We have carefully reviewed the testimony of Gentry, Dobler, Leone, and Meade. According to the testimony of Meade and Gentry, it was Wedelstedt who knew of the films in the Chicago warehouse, and Wedelstedt who suggested that Meade and Gentry steal them and that he would buy them.[7] These two then attempted the burglary on November 23, but were unsuccessful.[8]

When Meade and Gentry returned to tell Wedelstedt that it was too risky to attempt the theft, Meade added that they "would return at some later date and try again."

> Q. (Government) What was Mr. Wedelstedt's response?
>
> A. He was a little bit upset but he said, "Okay."

Gentry's testimony corroborated this conversation exactly.

It was Gentry who decided to steal the films on Decem-

---

[7] Q. Who brought up the subject?
A. Mr. Wedelstedt.
Q. In what manner did he bring it up?
A. Asked us if we wanted to make some money, he said that there was a building that would be easy to get into that contained thousands of films and he would be willing to buy them from us if we stole them.

[8] The burglary was foiled by the BCI, because the agency did not want to involve their informer Meade in further criminal activity.

ber 8. He did not include Meade, his former partner, but called upon two friends who had not met Wedelstedt. After the theft, Gentry, Dobler and Leone drove directly to Wedelstedt's home in Iowa with the films, stayed there all night, and were paid for the films the next day by Wedelstedt. However, Gentry testified that Wedelstedt was unaware that he and the others were going to carry out the theft at the time they did, on December 8.

Viewing the evidence in the light most favorable to the government, we find no error. The jury was free to conclude that Wedelstedt instigated the idea of stealing pornographic films in Chicago and returning them to Iowa. Wedelstedt directed the first unsuccessful theft, and okayed the idea that it be tried later. When Gentry decided later to try again, without Wedelstedt's knowledge, he knew he had a ready delivery point for the stolen film, a general price established, and an approving buyer. As Dobler testified: "I got the feeling that Mr. Gentry knew he could get rid of the material that we were going to take • • •." We cannot say a jury could not find Wedelstedt guilty of "some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed." *United States v. Frye, supra,* 548 F.2d at 768. The count four conviction is sustained.

IV. Suppression of Exhibits 79 and 54-78

Exhibit 79 is a list of adult films compiled by Dale Lavin, an employee of Wedelstedt. Lavin compiled the inventory list at Wedelstedt's direction, and the films on the list correspond to the films seized at the warehouse and introduced into evidence as exhibits 54-78. It was the government's contention at trial that exhibits 54-78 were the stolen "Chicago" films. The list came into the government's hands

through the informer Meade, who saw it attached to a box of films that Lavin was inventorying, and "suspected" it pertained to the films from Chicago.

Appellant alleges that the exhibit was illegally seized without a warrant in violation of the fourth amendment, that it was stolen by Meade, and that Meade's actions should be attributable to the government because he was acting as an informer for the government at the time.

Appellant moved to suppress the list in a pretrial motion, but the motion was denied. The government argues that appellant failed to preserve the objection.

"It is quite true generally that the overruling of a pretrial motion to suppress the use at the trial of particular evidence preserves the point and renders it unnecessary again to object when such evidence is offered at the trial." *Lawn v. United States,* 365 U.S. 339, 353 (1958). The issue here, however, is whether appellant's counsel thereafter "consciously and intentionally waived any objection to their receipt in evidence." *Id.* at 355.

Pretrial objections have been waived by a defendant's counsel who affirmatively stated "no objection" to the introduction of evidence he previously sought to have suppressed, *United States v. Mireles,* 570 F.2d 1287, 1290 (5th Cir. 1978); *United States v. Adams,* 422 F.2d 515, 518 (10th Cir.), *cert. denied,* 399 U.S. 913 (1970), or, who used the evidence for his purposes and then stated he had "no objection" to its introduction. *Lawn v. United States, supra,* 355 U.S. at 354.

Government exhibit 79 is identical to what defendant offered as exhibit A. Counsel for appellant was the *first* to introduce this exhibit into the trial, during his cross-examination of the government witness David Hintermeister. Soon after, exhibit 79 was introduced into evidence

with appellant's counsel stating "no objection."[9] Later, when the trial had ended, counsel renewed the motion to suppress "on all grounds heretofore urged on the Court • • • ."

We think the argument is fairly made that the objection was waived; however, we need not rest our decision on that basis alone. Assuming *arguendo* that the search was illegal, we do not feel its commission can fairly be attributed to the government. The testimony at trial and at the pretrial suppression hearing indicates that the government did not solicit Meade to get the film list, or seize anything, and did not know that the film list existed. Meade testified that his decision to take the list was unplanned:

> Q. Where did you get it?
>
> A. It was attached to the boxes of film that Mr. Lavin was inventorying.
>
> Q. What did you do with the list?
>
> A. I took the list and gave it to the agents.
>
> Q. One of the BCI agents?
>
> A. Yes.
>
> Q. Was this a spur-of-the-moment thing?
>
> A. Yes, it was. It wasn't planned out.

[9] A very similar colloquy occurred when exhibit 2-D was offered into evidence. Exhibit 2-D is merely the search warrant with exhibit 79, the inventory list, attached.

> The Court: My record doesn't—I think you stipulated to it, but it has never been offered.
>
> The Clerk: That is what I have.
>
> The Court: Two-D, did you wish to offer it, Mr. Kirshen? You had discussion about it.
>
> Mr. Kirshen: I had assumed that.
>
> Mr. Frerichs [Appellant's counsel]: I assumed it was in.
>
> Mr. Kirshen: I assumed likewise.
>
> Mr. Frerichs: I will stipulate the foundation, Your Honor, and we would offer it.

> Q. The agents hadn't asked you to get the list, had they?
>
> A. No.
>
> Q. What did you tell the agents about this list?
>
> A. I told them that—circumstances of how I saw the list and talked to Lavin, and I— Well, I can't say I knew, but I suspected these were the films from Chicago and I decided to get that list, figuring that it would be helpful to them.

At the time Meade took the list, he was an employee of Wedelstedt, providing information to the government about Wedelstedt in exchange for immunity from prosecution. However, there is no evidence that any federal or state agent "directed, authorized or knew" of the seizure by Meade. *United States v. Luciow,* 518 F.2d 298, 300 (8th Cir. 1975). In *Luciow,* the informer made an allegedly illegal entry and search. The defendant sought to suppress the evidence obtained, but the court found no violation of the fourth amendment: "Before • • • action can be attributed to the government, some degree of government instigation of the illegal entry must be shown." *Id.*

Here, there was no evidence that the seizure was conducted "with government knowledge and consent, tacit or explicit • • • ." *United States v. Mekjian,* 505 F.2d 1320, 1328 (5th Cir. 1975). The district court's detailed findings of nongovernmental involvement are not clearly erroneous.[10] Absent governmental involvement, there is no error

[10] At a pretrial evidentiary hearing agent Marlin testified extensively about the arrangement with Meade. Marlin said that he never suggested that Meade seize anything; Meade was supposed to provide information, particularly by means of the transmitter he wore, corroborating the criminal activity Meade had told police about. Meade was to receive immunity for certain crimes in exchange for the information and testimony he would provide. Meade was not granted immunity until the day of the trial. Meade received no salary, and was only paid for expenses he incurred.

in the admission of the exhibit. *Id.* at 1327. *See also Gunlach v. Janing,* 536 F.2d 754, 755 (8th Cir. 1976).

According to appellant, exhibits 54-78 were also erroneously admitted. This contention is premised on two independent arguments: first, because the state court in a post-seizure statutory hearing invalidated the search warrant it had previously issued, appellant argues that "considerations of the doctrines of comity, issue preclusion, due process, and those judicial considerations set forth in *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) preclude a federal court from nullifying a state court decision in respect to the unconstitutionality of a state seizure made through state processes." Secondly, appellant contends that on the merits the state court was correct in ruling that probable cause was lacking on the face of the affidavit.

Both arguments lack merit. For collateral estoppel to bar a criminal prosecution, if it were even applicable to this issue, "both adjudicatory entities must be arms of the same sovereign • • •." *United States v. Kills Plenty,* 466 F.2d 240, 243 (8th Cir. 1972), *cert. denied,* 410 U.S. 916 (1973). The conviction appealed from here is a federal conviction for federal crimes.

A federal court is not bound for reasons of comity by a state court's assessment of a warrant:

> While it is not entirely clear whether the state court relied on federal or state law as authority for its holding [that the warrant was unconstitutional], we are not, in any event, bound by its decision. "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins v. United States,* 364 U.S. 206, 223-24, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960).

United States v. Bedford, 519 F.2d 650, 654 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). Finally, *Stone v. Powell,* 428 U.S. 465 (1976) was meant to accord deference to state court search and seizure determinations where a *state* court defendant attacked his *state* conviction in a federal forum in a § 2254 collateral attack. *See Shane v. Iowa,* 581 F.2d 727 (8th Cir. 1978). It is inapplicable in this appeal of Wedelstedt's federal conviction.

Further, we disagree with the state court that probable cause to search the warehouse was lacking and that the ensuing warrant was unconstitutional.

The affidavit of agent Michael Marlin provided *inter alia*:

> On or about the 8th of December, 1974 a thaft [sic] occured [sic] in Chicago Illinois where more than 1000 8 millimeter pornographic films were stolen from a warehouse. Meade was originally asked by Wedelstedt to take part in this theft but did not do so. These films have since been observed by Meade at the warehouse at 311 9th Ave. S.E.: Cedar Rapids, Iowa. This theft was done at the direction of Wedelstedt, by his employees. This affiant overheard a conversation between Meade and Wedelstedt on the ____ day of December, 1974 where Meade said "How come you ripped of [sic] the films without me" and Wedelstedt said "I gave you a chance and you didn't want to do it" Meade than [sic] said "Did you give them (meaning the

thieves) $2 a film as our deal was" and the remainder of that portion of the conversation was unintelligable [sic]. A complete list of these films is attached hereto marked Exhibit B.

On December 13, 1974 the informant, thomas Meade advised that from his observation at the warehouse 311 9th Ave. S.E. the film stolen from Chicago, a poloroid [sic] camera taken in the Sheppard [sic] burglary, Electronic desk computer, univac, stolen in the State of Utah, a [sic] adding machine also from Utah were present at that location.

The affidavit further states that Meade is Wedelstedt's employee; that he is under indictment for arson; that the averments he makes to affiant are against his penal interest, and that Meade fears for his safety because of threats Wedelstedt has made against others. Finally it is averred that Meade has provided reliable information in the past which was corroborated by independent investigation and monitoring of Meade's conversations with Wedelstedt. The standard for assessing the adequacy of a tip is a familiar one:

> To form an adequate basis for a finding of probable cause, an informant's hearsay tip must reveal (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible and his information reliable. *Aguilar v. Texas,* 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

United States v. Regan, 525 F.2d 1151, 1155-56 (8th Cir. 1975). The basis of Meade's tip that the illicit films were

in the warehouse was his personal observation of them. He specified the place at which he saw them, and the date. Attached to the affidavit was an inventory list of the films he had observed. "[T]he informant's statement that she had *personally* observed the tablets at defendant's residence clearly satisfies the first of these requirements." *United States v. Gavic,* 520 F.2d 1346, 1350 (8th Cir. 1975) (emphasis added). *See also United States v. Marchildon,* 519 F.2d 337, 341 (8th Cir. 1975).

The second prong of the *Aguilar* test is satisfied as well. "The fact that an informant has previously given accurate information may be a sufficient test of his reliability." *United States v. Cummings,* 507 F.2d 324, 328 (8th Cir. 1974). In this case such an averment was made, and Meade was identified by name. Moreover, Meade related to the agent in great detail, all of which appears in the affidavit, his complicity in an arson offense which he allegedly committed at Wedelstedt's request. These statements were clearly against his penal interest, and provide "an additional reason for crediting the informant's tip." *United States v. Harris,* 403 U.S. 573, 583 (1971).

The basis of Wedelstedt's main objection is the first sentence of the quoted portion of the affidavit: "On or about the 8th of December, 1974 a thaft [sic] occured [sic] in Chicago Illinois where more than 1000 8 millimeter pornographic films were stolen from a warehouse." Appellant argues that this statement misleadingly appears to have come from official sources, though testimony at the suppression hearing established that the theft had never been reported, and that Meade was also the source of this statement. We agree with appellant that it is not clear that Meade, and not the affiant, was the source of this statement, and that it should have been made clearer. However, we do not think this is fatal, and we will assess

this statement with the assumption the informer was its source.

Other information in the affidavit supplied by Meade provides adequate underlying circumstances for inferring that these were stolen, pornographic films from Chicago. According to the affidavit, Meade had originally been asked to take part in the theft, and it may logically be inferred that he knew where the films were from and what it was he had been asked to steal—8 millimeter pornographic movies. More importantly, however, the affidavit relates that a theft of films had actually taken place, and this fact was corroborated by a conversation between Wedelstedt and Meade about the theft, which was overheard and restated by the affiant himself. These facts, linked with Meade's personal observation of the 8 millimeter films on December 13, are sufficient to support the initial statement. We have often said that an "affidavit need only establish the *probability* of criminal activity and secreting of evidence on specific premises, not proof beyond a reasonable doubt." *United States v. Smith,* 462 F.2d 456, 460 (8th Cir. 1972).

We conclude that the search was based on an adequate showing of probable cause, and the admission of the seized films was proper.

V. Instructions to Jury on Conspiracy; Aiding and Abetting

Next, appellant challenges the jury instructions, and specifically charges that the trial court failed to instruct on his theory of defense to the charges of conspiracy, and of aiding and abetting the interstate transportation of obscene materials.

The court gave five instructions relating to conspiracy which completely covered the applicable legal principles

on conspiracy. "[T]he court retains discretion in *framing* the instruction; it is therefore sufficient that the charge to the jury adequately and correctly covers the *substance* of the requested instruction." *United States v. Brown,* 540 F.2d 364, 380 (8th Cir. 1976) (emphasis added).

One requested instruction not included, however, related to abandonment of the conspiracy, and would have instructed the jury that it must find defendant "not guilty" if the conspiracy had been abandoned at the time Gentry, Leone, and Dobler agreed to steal the films. We do not think the evidence justified such an instruction; there is no evidence that the illegal object of the agreement was surrendered when the first theft was frustrated—it was in fact later carried out. Further, and more precisely, there was no evidence that Wedelstedt withdrew from the conspiracy. "[W]ithdrawal requires some affirmative action tending to defeat or disavow the purpose of the scheme, and the abandonment must be complete and in good faith." *United States v. Nowak,* 448 F.2d 134, 139 (7th Cir. 1971).

Additionally we believe that it was not error to refuse appellant's two aiding and abetting instructions.[11]

The substance of the first requested instruction is covered in the court's lengthy aiding and abetting charge. The second, which states a correct legal principle, may be inferred from the instruction given which provides, *inter alia,* that a person aids or abets another in a crime "if

> Instructions are not a substitute for argument to the jury. If the judge fairly instructs the jury as to

[11] Those instructions were:

[1] In order to aid and abet the commission of a crime, it is necessary that the supposed aider or abetter act with knowledge that an offense is to be committed.

[2] A person cannot aid or abet a crime which has already been committed.

he knowingly and willfully associates himself in some way with the criminal venture, with the intent to commit the crime, willfully participates in it as something he wishes to bring about, and willfully seeks by some action of his to make it succeed."

Moreover,

> Instructions are not a substitute for argument to the jury. If the judge fairly instructs the jury as to applicable principles of law so as to allow counsel on each side sufficient latitude to argue what he considers to be key points in his case, the trial judge has performed his duty. It is neither required nor appropriate for the judge to accentuate any particular legal principle.

United States v. Campanale, 518 F.2d 352, 362 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976). We have reviewed the instructions as a whole, and find no error.

VI. Instructions on Obscenity

Wedelstedt's objections to the instructions explaining "community standards" and how "community standards" should be applied under the *Miller v. California,* 413 U.S. 15 (1973) test, are completely without merit. The court's thorough instructions on obscenity (instructions 14-18) clearly convey to the jury that the determination of "obscenity," which the jury must analyze under the three-part test set out in *Miller,* it not a matter of individual taste, but must be judged according to the "community standard."

Nor did the court commit reversible error in refusing to admit Chapter 725 of the Iowa Code into evidence. That chapter, entitled "Obscenity and Indecency," defines "obscene material" for the purposes of that chapter, and regu-

lates, *inter alia,* certain aspects of the distribution of such material, such as distribution to minors. Appellant argues that the Iowa Code "is admissible testimony and has relevance as to what the 'community standards' in Iowa are."

The statutory law in Iowa is not controlling on the question of "community standards." Under section 1465, which prohibits the interstate transportation of obscene materials:

> We deal with a federal law which neither incorporates nor depends upon the laws of the states. *United States v. Hill,* 500 F.2d 733 (5th Cir. 1974). Rather, the federal law depends for its constitutionality upon definitions incorporating community standards. Community standards are aggregates of the attitudes of average people—people who are neither "particularly susceptible or sensitive . . . or indeed . . . totally insensitive." *Miller v. California, supra,* 413 U.S. at 33, 93 S.Ct. at 2620. The fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the trial court [this case was tried to the court], and in this case the trial court did resolve it.

United States v. Danley, 523 F.2d 369, 370 (9th Cir. 1975), *cert. denied,* 424 U.S. 929 (1976).

The Supreme Court cited the *Danley* holding with approval in *Smith v. United States,* 431 U.S. 291 (1977), a case from this court which the Supreme Court affirmed:

> We hold only that the Iowa statute is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. Those are questions for the jury to decide, in its traditional role as factfinder.

Id. at 308.

The Court also indicated, however, that the admission of state statutory law was permissible, and may have indicated that a defendant was entitled to have a jury consider the same. *See Smith v. United States, supra,* 431 U.S. at 309.

In this case, while the statute itself was not given to the jury to interpret, the court specifically instructed the jury on it.

As a matter of *law,* the court told the jury:

> In addition, [in determining community standards] you may consider the fact that the Iowa Supreme Court held the Iowa obscenity statutes unconstitutional in 1973 and that the *Iowa State legislature repealed Iowa's obscenity laws with respect to consenting adults in 1974.* (Emphasis added.)

This is a correct statement of the law at that time. *See Smith v. United States, supra,* 431 U.S. at 295. ("At the time petitioner engaged in the conduct at issue here, Iowa law placed no limits on the distribution of obscene material to adults." *Id.* at 309 (Powell, J. concurring).)[12] *See also Chelsea Theater Corp. v. City of Burlington,* 258 N.W. 2d 372 (Ia. 1977).

We think the court's instruction to the jury on Iowa law, which was favorable to defendant's position, obviates any error in not admitting the statute into evidence.

VII. Submission of Indictment to the Jury

Finally, appellant strenuously objected to the submission of the indictment to the jury, arguing that no opportunity

[12] The crimes committed here occurred in November and December 1974. The Iowa obscenity laws which restricted their application to dissemination to minors only became effective on July 1, 1974. *Smith v. United States, supra,* 431 U.S. 295.

to provide a similar statement was provided to him and that it was extremely prejudicial.

The sum total of the government's response, without citation, is that this is a "common practice" in the Eighth Circuit. We do not agree that it is "common," but it is a practice which is within the sound discretion of the trial court if the jury is properly admonished that the indictment is not evidence of any kind. That was done in this case. *See United States v. McGrady,* 508 F.2d 13, 21 (8th Cir. 1974), *cert. denied,* 420 U.S. 979 (1975); *United States v. Warner,* 428 F.2d 730, 736 (8th Cir.), *cert. denied,* 400 U.S. 930 (1970). There was no abuse of discretion here.

Conclusion

We have carefully considered the numerous allegations, and finding no reversible error, affirm the conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION
No. CR 77-19

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

EDWARD JOSEPH WEDELSTEDT,

Defendant.

ORDER

This matter is before the court on defendant's resisted motion for new trial filed September 9, 1977. The motion states numerous grounds for a new trial, some of which raise questions worthy of consideration.

Exhibit 79

Defendant urges his objections to the admissibility of Exhibit 79 which is the list of pornographic films made by Dale Lewin and taken by Thomas Meade. This matter was previously considered by the court in its order filed August 29, 1977 at pages 8 through 10. The facts and findings set out therein are incorporated into this order.

Defendant's principal argument urged at this time is since there was a prior informer relationship between Meade and the BCI the action by Meade was enough to constitute government action. In support of this position he cites *United States v. Stein,* 322 F.Supp. 346 (N.D. Ill. 1971) and *Knoll Associates, Inc. v. FTC,* 397 F.2d 530 (7th Cir. 1968).

These cases have been adequately distinguished in the government's brief. Further, as previously indicated, the record in this case in light of all the circumstances does not reveal any improper governmental action or encouragement or participation which would warrant exclusion of Exhibit 79. Here, Meade was directed to do certain specific things which he did. Over and above this, without the knowledge or consent of the state agents, he obtained Exhibit 79.

In light of the above it is unnecessary to consider the questions of whether the plain view doctrine applies or if this case would be an appropriate one, assuming an illegal seizure, for not applying the exclusionary rule. In passing the court would note it is inclined to accept both of these arguments made by the government.

December Warrants

Defendant once again seeks to have the December warrants quashed on the basis of lack of probable cause for their issuance. This matter was considered in the court's August 29, 1977 order and has been reconsidered now. In its review of the record the court has found nothing which would lead it to change its prior ruling which is affirmed.

Defendant has also asserted a somewhat vague due process argument regarding the December warrants. Ap-

parently defendant contends that the state court's suppression of the warrants was based upon a state constitutional ground and that allowance of the evidence is nothing more than an extension of the Silver Platter Doctrine. In this regard defendant argues that it is clear from the state record that the warrants were suppressed because the state judge felt that he had been misled by the affidavit in support of the warrant.

This argument must fail upon at least two grounds. First, there is absolutely nothing in this record which indicates what the state judge based his decision. Further, the nature of the misrepresentation alleged is not only unclear but the record is void of any misrepresentation.

Secondly, admissibility here is to be determined by a meeting of federal constitutional requirements rather than those of the state which may arguably be more strict. *United States v. Bedford,* 519 F.2d 650 (3d Cir. 1975). Here the court has concluded this test has been met.

Neither are defendant's comity arguments persuasive at this time.

Motion for Acquittal—Conspiracy

Defendant argues that the court erred in failing to grant defendant's motion for judgment of acquittal with respect to the alleged conspiracy to transport the Shepard films in interstate commerce. He claims that defendant was involved only in an intrastate sale and that because the sale was to a government agent acting as a "west coast" buyer there was no nexus with interstate commerce.

The testimony showed that defendant, Gentry and Leone conspired to make a sale to an individual they believed to be a "west coast" buyer who came to Iowa to pick up the films.

The elements of a conspiracy are:

> (1) The conspiracy to commit the offense against the United States was willfully formed and existed at or about the time alleged;
>
> (2) That defendant knowingly participated in the conspiracy with the intent to commit the offense which was the object of the conspiracy; and
>
> (3) That during the existence of the conspiracy, at least one overt act was knowingly committed by one of the members in furtherance of the objectives of the conspiracy. (Instr. 8).

In this case testimony clearly demonstrated that defendant took part in the willful formation of a conspiracy to sell the Shepard films to those he believed to be out-of-state buyers, that he knowingly participated in the conspiracy with his accomplices, Gentry and Leone, and that Gentry and Leone did in fact deliver the films.

The members of the conspiracy, defendant, Gentry and Leone were obviously mistaken as to the identity of the buyers, but regardless, all elements were proven.

Conspiracy connotes a scheme to carry out an unlawful act. The evidence clearly established the existence of such a scheme.

Delay in Bringing the Indictment

Defendant raises the claim that failure to promptly indict prejudiced defendant's ability to prepare a defense. Any prejudice suffered would seem insignificant and does not require a new trial. There is no showing here that the government purposefully delayed bringing the indictment in an attempt to prejudice defendant or that the delay was

caused by any reason other than the continuing investigation. *See United States v. Lovasco,* 45 USLW 4627 (U.S., June 9, 1977); *United States v. Marion,* 404 U.S. 307 (1971).

Refusal to Take Judicial Notice of Iowa Law or Admit into Evidence Chapter 725 of the 1973 Code of Iowa

Defendant asserts that the court erred in not taking judicial notice of Iowa's obscenity laws or submitting Chapter 725 of the 1973 Code of Iowa to the jury. The court's instruction did note that Iowa's obscenity laws with respect to consenting adults were repealed in 1974 after the Iowa Supreme Court held the statutes unconstitutional in 1973.

The proffered instruction presumes that Chapter 725 deregulates obscenity between consenting adults. However, the legislative intent of the new sections is not so clear and the distinctions between defendant's requests and the court's instruction are so fine as to be non-existent. To instruct further as to Chapter 725 would only serve to confuse the jury.

Defendant's final argument to the jury as to the meaning of recent legislation and its impact was sufficient to present his theory on the law of obscenity in Iowa.

The other instruction on obscenity fully outlined the present law and repeatedly emphasized that determination of obscenity must be based on what the "average" person of the community would view as obscene. (Instructions 14-20). Defendant points to one instruction and notes that it did not include an "average" person admonition. But the instructions and the law state that instructions must be read as a whole and not individually. Where, as in this case, the instructions were read to the jurors as a whole

and copies were not provided them, there is little danger that they will misinterpret the integrated instructions.

Failure to Instruct on Defendant's Theory of the Case

The defendant's claim that the court failed to instruct as to its theory of the case is patently frivolous. The requested instructions were encompassed in the court's conspiracy instructions 9, 9A, 10 and 10A. *Bass v. United States,* 324 F.2d 168, 172 (8th Cir. 1963); *United States v. Marshall,* 532 F.2d 1279, 1286, 1287 rehearing and rehearing en banc denied (1976); *United States v. Campanale,* 518 F.2d 352 (9th Cir. 1975) *cert. denied sub nom. Grancich v. United States,* 423 U.S. 1050 and *Mathews v. United States,* 423 U.S. 1050, rehearing denied 96 S.Ct. 1422; *see United States v. Calvert,* 523 F.2d 895 (8th Cir. 1975) *cert. denied* 96 S.Ct. 1106.

Motion for Acquittal—Count 4

Count 4 charged defendant with aiding and abetting the transportation in interstate commerce of obscene films. Defendant seems to claim that his only contact with the Cameo films was that he bought them from the thieves, Gentry, Dobler and Leone. He states that the evidence showed that he did nothing that could be inferred as an act assisting in the theft. The court's instruction 21 on aiding and abetting stated in relevant part:

> Any person who advises, invites, or *connives* at an offense, or aids or abets the principal offender, is punishable as a principal.
>
> A person aids and abets another in the commission of a crime if he knowingly and willfully associates himself in some way with the criminal venture, with the intent to commit the crime, willfully participates in it

as something he wishes to bring about, and willfully seeks by some action of his to make it succeed.

Some conduct by the defendant of an affirmative character in furtherance of a common criminal design or purpose is necessary. Mere physical presence or knowledge by the defendant at the time and place of the commission of an offense is not by itself sufficient to establish his guilt. It is not necessary that any specific time or mode of committing the offense shall have been advised or commanded, or that it shall have been committed in the particular way instigated or agreed upon. . . .

Again the record indicates there was sufficient testimony on which the jury could convict. Meade and Gentry testified that after aborting their first attempt to steal the films at defendant's request, that Meade said they would "return and try again". Meade and Gentry further testified that defendant agreed that they should try again. Gentry testified that he finally robbed the warehouse without defendant reordering it or knowing about it. However, there was enough evidence for a jury to find that defendant originally induced the crime, intended that it be carried through, and later continued to participate by purchasing the films.

The jury could easily find that the two attempts were linked and not separate crimes as defendant asserts. This is not a case of using evidence of one crime to provide the commission of another.

Prejudicial Joinder

Defendant combines several claims of error under the heading "Prejudicial Joinder". It is not necessary to discuss the section based on the hypothesis that the Shepard conspiracy should have been dismissed.

The defendant raises the possibility that defendant was convicted of one crime on the basis of evidence offered to prove another. There was sufficient evidence of the defendant's complicity in both the Shepard and Cameo thefts to allow a jury to convict. The court's instruction as to the proof necessary to support guilt for separate crimes apprised the jury of its responsibility not to convict for one crime on evidence of another. (Instruction 7).

Next, the defendant raises a due process argument which resembles an entrapment defense, claiming that state agents furnished defendant with the stolen property, funded and engineered the theft and attempted distribution of the Shepard films. The record shows that Meade stole the films in September at the request of defendant. Meade's contact with agents from the state BCI began November 9, 1974. From that time Meade cooperated with law enforcement officials in setting up the sale of the Shepard films. It would appear that defendant is claiming that the fact that after defendant put the films into Meade's hands, Meade's turning them over to defendant's other employees was tantamount to supplying the defendant with stolen property. The chain cannot so easily be broken. The record clearly indicates that defendant and Meade conspired to steal the Shepard films. They were kept by defendant and turned over to Meade for sale to BCI agents acting as out-of-state buyers. Meade turned them over to Gentry and Dobler, co-conspirators who plead guilty in a previous proceeding, who then delivered them to the state agents. It cannot be said that the state furnished defendant with the stolen property or that the conspiracy to steal and sell the films was the creation of state agents. Certainly the record shows that defendant

was involved with the theft and was seeking a buyer. Once offered the chance to sell the films to agents acting as out-of-state buyers, he set up the machinery for delivery. The fact the buyers were agents does not taint the conspiracy which existed between defendant and non-agents.

Defendant's last contention in this section poses the thorny question of whether joinder effectively prevented him from testifying on his own behalf about one of the crimes. He claims that he could have presented a defense as to the interstate nature of the Shepard transactions but to take the stand would have meant the possibility he would have been forced to incriminate himself as to the Cameo thefts. It is difficult on this record to find that defendant was prejudiced where there is testimony of two co-conspirators as to the intended sale to a "west coast" buyer who was actually purchasing the films in Iowa.

This case is unlike *United States v. Yow,* 465 F.2d 1328, 1331-1332 (8th Cir. 1972) in which inadmissible hearsay by the only key witness was held to be so prejudicial as to require a new trial. *Also see Kotteakos v. United States,* 328 U.S. 750, 764-765 (1946).

As the Eighth Circuit Court of Appeals stated in *United States v. Mancino,* 468 F.2d 1350, 1352 (8th Cir. 1972), "the admission of the questioned evidence was harmless beyond a reasonable doubt". *See generally Milton v. Wainwright,* 407 U.S. 371 (1972).

Hearsay Testimony

Defendant claims that Meade's testimony as to Dale Lavin's valuation of the stolen pornographic films was hearsay and requires a new trial. Under the Federal Rules of Evidence 801(d)(2)(D) "a statement is not hearsay if . . . the statement is offered against a party and is a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . ." Lavin's statements to Meade were made while Lavin was defendant's employee and concerned the value of films sold from defendant's warehouse. It is therefore not hearsay. It also might fall under FREv 801(d)(2)(E).

Even if this court were to accept defendant's categorization of Meade's testimony, a new trial would not be necessary, for there was sufficient evidence of value independent of Meade's testimony to allow a jury to find that the minimum $5,000 jurisdictional amount had been reached to satisfy 18 USC §2315. Therefore, even if the testimony in question were hearsay the statements were not so prejudicial as to require a new trial.

Submission of Indictment to Jury

Defendant, citing no authority, challenges the submission of the indictment to the jury as prejudicial and a violation of defendant's fifth amendment due process rights. It would appear that there is little case authority on sending indictments to the jury. The Second Circuit Court of Appeals recently expressly refused to decide if and when a jury should view the indictment. *United States v. Cirami,* 510 F.2d 69 (2d Cir. 1975) *cert. denied* 95 S.Ct. 1952.

However, numerous cases have approved the reading of the indictment to the jury where it did not prejudice defendant's rights and where the court instructed the jury that the indictment was not evidence. See Instruction 3. *United States v. Marzet,* 526 F.2d 277 (5th Cir. 1976); *United States v. Matthews,* 453 F.2d 1237 (8th Cir. 1972); *United States v. Polizzi,* 500 F.2d 586 (9th Cir. 1974) *cert. denied* 95 S.Ct. 802; *Knoll v. United States,* 433 F.2d 1282

(5th Cir. 1970) *cert. denied sub nom., Adler v. United States,* 402 U.S. 944. *See Blauner v. United States,* 293 F.2d 723 (8th Cir. 1961) *cert. denied* 368 U.S. 931.

In the present case the evidence presented in court closely tracked the overt acts as laid out in the indictment. The court's instruction as to an indictment not being evidence however should have sufficed to apprise jurors of their duty. Defendant is correct in the assertion that the indictment represents the government's case against the defendant. But, it was necessary to send it to the jury in order to clarify the individual counts and prevent jury confusion which might be prejudicial to the defendant's interests. So long as the courts have approved the reading of indictments to the jury, it is difficult to find that giving it a copy of the indictment creates prejudice.

It is therefore

ORDERED

All pending motions denied.
November 15, 1977.

/s/ EDWARD J. MCMANUS,
Edward J. McManus, Chief Judge
United States District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION
No. CR 77-19

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

EDWARD JOSEPH WEDELSTEDT,

Defendant.

ORDER

This matter is before the court upon defendant's motions to suppress, for continuance and severance, filed August 18, 1977 and defendant's motion to dismiss filed August 25, 1977. All motions have been resisted.

Defendant is charged in a five count indictment arising from the theft of films from Chicago, Illinois and Davenport, Iowa in 1974. Defendant is charged in count 2 with aiding and abetting the interstate transportation of stolen property; in count 3 with receiving stolen property which was moving as, was a part of, or which constituted interstate commerce; in count 4 with interstate transportation of obscene materials and in count 5 with receiving stolen property which was moving, was a part of or which con-

stituted interstate commerce. Counts 2-4 deal with the Chicago films while count 5 deals with the Davenport films. Count 1 charges a conspiracy to commit the above offenses.

Motion to Dismiss

The defendant moves to dismiss count 5 and the section of count 1 which deals with a conspiracy to commit the crime alleged in count 5. Defendant contends, and the court agrees, that in order to invoke 18 USC §2315 as alleged in count 5, it is necessary that stolen materials constitute, move in, or be part of interstate commerce. In this case the uncontroverted evidence shows that the films involved in count 5 had come to rest in a private collection in Davenport, Iowa, were stolen, and later recovered, having never left Iowa.

The government offers the propositions that the very nature of motion pictures and the fact they were produced outside of Iowa bring them within the ambit of interstate commerce as construed in Section 2315.

At the August 25, 1977 hearing on the motion to dismiss the government sought to analogize the language of Section 2315 to that of Title VII of the Omnibus Crime Control and Safe Streets Act of 1966. 18 USC §1201(c). But as the United States Supreme Court recently indicated in *Scarborough v. United States,* 45 LW 4570 (June 7, 1977) this analogy is inapposite. The preamble to 18 USC §1201 clearly sets out congressional intent to require only the slightest nexus with interstate commerce in cases in which a felon receives, possesses or transports a firearm.[1] In fact,

[1] Title 18 U.S.C. App. §1201 reads in its entirety:

"Congressional findings and declaration

"The Congress hereby finds and declares that the receipt, possession or transportation of a firearm by felons, veterans

(footnote continued on following page)

receipt, possession, or transportation of a firearm is specifically deemed to constitute a burden on commerce or threat affecting the free flow of commerce.[2] The court's discussion of the legislative history of Section 1201 buoys this analysis. *Scarborough v. United States,* 45 LW at 4572-4573.

The *Scarborough* court states that where Congress acts to prohibit "both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities." *Id.* at 4572.

Thus it is clear that Congress may fill the field with respect to a felon's possession of firearms and has specifically done so. That it has not gone so far with respect to stolen goods is clear from the statutory language of Section 2315.

Section 2315 requires more with respect to a nexus to interstate commerce than Section 1201. The cases dealing with motion pictures indicate that where films are being distributed solely on an intrastate basis, though originally produced outside the state in which they came to rest, they are part of intrastate commerce and not subject to federal law. See *Film Transit, Inc. v. Carson,* 287 SW2d

who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce.

"(2) a threat to the safety of the President of the United States and Vice President of the United States.

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

[2] See note 1, *supra.*

47, 199 Tenn. 423 (1956); *Kappler v. Republic Pictures Corp.*, 59 F.Supp. 112 (S.D. Iowa 1945), *aff'd* 151 F.2d 543, *aff'd* 327 U.S. 757, rehearing denied 327 U.S. 817.

The Dyer Act represents a better developed and analogous area of law. 18 USC §2313 (1946). If before a theft an auto came into a state and came to rest, was then stolen, and remained in the state in which it was stolen, the theft would not constitute interstate commerce. *Cox v. United States,* 96 F.2d 41 (8th Cir. 1938); *Hill v. Sanford,* 131 F.2d 417 (5th Cir. 1942) *cert. denied* 318 U.S. 774; *Grimsley v. United States,* 50 F.2d 509 (5th Cir. 1931).

But if the car is stolen and moved across state lines and sold to a purchaser who knew the car was stolen, the auto has not come to rest in the state of sale. In *United States v. Brady,* 425 F.2d 309 (8th Cir. 1970) a car stolen to order in Kansas was sold in Missouri. The court held that where the Missouri purchaser ordered a Cadillac from a "hustler" who delivered a used car with Colorado plates and purchaser immediately put Missouri plates on the car, a jury could find that the purchaser knew the car was stolen and that the purchase was merely the final step in a continuous scheme of theft and interstate commerce. This and other Dyer act cases require that the theft involve the interstate movement of the stolen motor vehicles. In fact the Eighth Circuit Court of Appeals has stated:

> If the car had lost the character of interstate commerce at the time it was received, etc., no offense against the United States has been proven. . . . The act [18 USC §408] does not purport to exercise jurisdiction over individuals who receive or sell stolen cars after such cars cease to move in or be a part of interstate commerce. Commerce would have no constitutional authority to pass this act except for the commerce clause of the Constitution.

Davidson v. United States, 61 F.2d 250, 255 (8th Cir. 1932).

The films in question in count 5 clearly had come to rest in a private collection out of the stream of interstate commerce. As they never left the state after the theft they must be considered the subject of intrastate activity and thus subject to state and not federal law.

In addition the government claims that the question of whether an object has come to rest is a fact question for a jury. He cites Dyer Act cases as authority. However each of the cases cited and others considered by the court are clearly distinguishable. In those cases the fact finder was asked to determine if, when, and where the stolen auto came to rest after the theft. *See Lee v. United States,* 363 F.2d 469 (8th Cir. 1966) *cert. denied* 385 U.S. 947; *United States v. Johnson,* 409 F.2d 861 (7th Cir. 1969); *United States v. Ollary,* 466 F.2d 545 (4th Cir. 1972); *United States v. Dadurian,* 450 F.2d 22 (1st Cir. 1971). For Section 2315 cases see *United States v. Gardner,* 516 F.2d 334 (7th Cir. 1975), *cert. denied* 375 U.S. 815; *Corey v. United States,* 305 F.2d 232 (9th Cir. 1962), *cert. denied* 371 U.S. 956.

Therefore the claim that the issue in question must be preserved for jury determination is not well taken, where, as here, there is no showing that the stolen films ever left the state.

Motion to Suppress

On August 18, 1977 defendant filed a general motion to suppress and a request for a pretrial conference to clarify the issues in the case. This matter was referred to the

Magistrate who held a pretrial conference and partial hearing on the motion to suppress on August 23, 1977. The hearing was reset before the court on August 25, 1977 and the court heard further testimony and arguments on the matter.

As a result of the pretrial and hearing before the court, the parties have agreed to submission of the issues set out below upon Government Exhibits 1(a) through 1(o) and 2(a) through 2(i) and the testimony of Michael D. Marlin taken before the Magistrate and court.

1. Are the search warrants (September warrants) marked Government Exhibits 1A and 1B invalid because they fail to contain a particular description of the property to be seized as required by the Fourth Amendment.

2. Was Exhibit B attached to Exhibit 2 improperly seized. (Meade list)

3. Did the Information for a search warrant (December warrants) marked Government Exhibit 2A contain sufficient probable cause within its four corners.

   (a) If so and assuming Exhibit B was illegally seized,

      1. Does that render the warrants invalid per se?

      2. If the warrant is not invalid per se is there probable cause without inclusion of Exhibit B?

   (b) Does the state court's prior determination of no probable cause preclude this court's reconsideration of the issue?

September Warrants

On September 16, 1974 a state court judge issued the search warrants now marked Government Exhibits 1A and 1B. These warrants were issued in support of a state tax investigation regarding defendant's personal income tax, payment of state sales tax and corporate income tax. They were supported by oral testimony (Government Exhibit D) taken by the issuing judge which clearly establish probable cause and describe the property sought to be seized. See Government Exhibit O, p. 4 lines 19-25, p. 5 lines 1-25, p. 6 lines 1-9 and p. 9 lines 1-7. Indeed defendant does not challenge the probable cause here.

The testifying officers executed the warrants. However the affidavit was apparently not transcribed at the time and neither attached to or incorporated into the warrant. The warrants themselves authorized a search for "all business records, corporate or individual, belonging to Edward J. Wedelstedt or any corporation in which he may have an interest".

As indicated above, defendant objects to these warrants as being general warrants which violate the Fourth Amendment to the United States Constitution.

The requirement of "particular description" contained in the Fourth Amendment was intended to outlaw "general warrants" which allowed a general exploratory rummaging into a person's belongings. *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971). The constitutional standard for particularity of description in a search warrant dictates that the language be sufficiently definite to enable the searcher to reasonably ascertain and identify the things authorized to be seized. *Steele v. United States,* 267 U.S. 498, 503-504 (1925). As to what is to be taken, nothing is

left to the discretion of the officer executing the warrant. *Andresen v. State of Maryland,* 44 LW 5125 (1976).

Ordinarily specificity must be found in the warrant itself so as to limit the discretion of the officer and give notice to the party searched. *United States v. Marti,* 421 F.2d 1263 (2d Cir. 1970). However where the affidavit accompanies the warrant and the warrant uses suitable words of reference which incorporate the affidavit therein, a general warrant may be saved. *See e.g. United States v. Johnson,* 541 F.2d 1311, 1315 (8th Cir. 1976); *United States v. Womack,* 509 F.2d 368 (D.C. Cir. 1974); *United States v. Lightfoot,* 506 F.2d 238 (D.C. Cir. 1974); *Moore v. United States,* 461 F.2d 1236 (D.C. Cir. 1972). Unfortunately here neither requirement was met and the government must rely on the face of the warrant.

The degree of specificity required when describing the goods to be seized may necessarily vary according to the types of items involved. *United States v. Davis,* 542 F.2d 743 (8th Cir. 1976).

In this regard the Eighth Circuit has recently held that there is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of items to be seized. *United States v. Davis, supra; United States v. Johnson, supra.*

Here even applying this broad standard, these warrants cannot be sustained. In all the cases which the court has found the officers have been directed to specific categories of records such as appointment books, bank books, ledgers, deposit tickets, copies of invoices and bills, etc. Further, a specific time period has been contained within the warrant. See *Shaffer v. Wilson,* 523 F.2d 175 (10th Cir. 1975); *AHE v. Howland,* 508 F.2d 364 (9th Cir. 1974). An examination of the transcript of testimony shows that these requirements could have been met by the agents. Under these circumstances the officers were given unlimited discretion and the warrant must be struck down.

Meade List

Next, defendant moves to suppress the list of pornographic films attached to Government Exhibit 2A as Exhibit B. It is undisputed that this list was taken from defendant's office by Thomas Meade.

Further, the court finds from the testimony that Meade had contacted agents of the BCI in September of 1974 regarding the possibility of his being granted immunity in exchange for his supplying them with certain information. A deal was ultimately worked out under which Meade would be given immunity upon his supplying the BCI with information regarding crimes in which defendant was implicated. The information to be supplied involved both corroboration of information of criminal acts in which defendant had been involved and which Meade was aware of and had related to the BCI previously as well as future evidence. The deal was consummated prior to obtaining the list.

To carry out his part of the deal, Meade was to wear an electronic device which would enable BCI agents to hear and record his conversations with defendant. Meade was under the control of the BCI regarding such things as how close he should be to defendant and what appliance would effect the surveillance. He also, on occasion, received direction as to areas of conversation.

Immunity was conditioned upon supplying evidence against defendant and not upon conviction. Meade was given immunity prior to the state trial.

In addition to immunity, Meade received certain expense payments from the BCI.

At all times material, Meade was employed by defendant, and he secured the list without direction from the BCI. In fact, the BCI had no knowledge that the list existed until it was delivered in December of 1974 prior to the issuance of the search warrants.

Defendant contends that the seizure of the list by Meade constituted governmental action and, consequently, to be legal must be justified by one of the exceptions to the warrant rule. The government claims that at the time the list was seized Meade was acting as a private person and hence the Fourth Amendment has no application. In the alternative, the government claims that if Meade was a State Agent at the time of the seizure it was none the less legal under the plain view rule.

It seems clear that the Fourth Amendment affords no protection against a wrongful search and seizure of property absent any govenment participation. See e.g. *Burdeau v. McDowell,* 256 U.S. 465 (1912); *Gundlach v. Janing,* 536 F.2d 754 (8th Cir. 1976); *Eisentrager v. Hocker,* 450 F.2d 490 (9th Cir. 1971). Here defendant's position seems to be that the fact that Meade was a government agent at the time he took the list is all that is required and the fact that the BCI was unaware of the list until it was discovered and did not instruct Meade to seize anything is irrelevant.

Defendant's motion is not well taken. Before Meade's action can be attributed to the government, some degree of government instigation, knowledge and consent, or participation in the seizure must be shown. See e.g. *United States v. Luciow,* 518 F.2d 198 (8th Cir. 1975) (Government informer illegally entered defendant's apartment to obtain information for a search warrant); *United States v. Valen,* 479 F.2d 467 (3rd Cir. 1975) (Informer paid for

specific information in past and instant case not sufficient to make him a government agent); *United States v. Mekjian,* 505 F.2d 1320 (5th Cir. 1975) (continued copies after initial contact by defendant employee not invalid); see also *United States v. Clegg,* 509 F.2d 605 (5th Cir. 1975). Likewise, a private search will not take on a governmental cloak merely because the party's purpose is to aid the government. *United States v. Newton,* 510 F.2d 1149 (6th Cir. 1975).

In all of the cases that the court has found, which have found governmental action, there was some direct knowledge, participation or instigation of the search. Here such participation is completely lacking. Meade was an informer instructed to gather evidence against defendant primarily through observation and electronic surveillance. He was not instructed to seize anything by the government. Further, the government had no knowledge of the list until after it was seized.

Finally, in the event Meade could be considered a government agent, the seizure would be justified under the plain view doctrine. The evidence shows that at the time of the seizure Meade was an employee of defendant and there is no indication he was not lawfully where he was when the seizure took place. Further, he had no obligation to reveal his identity as an informer. Cf. *United States v. Glassel,* 488 F.2d 143 (9th Cir. 1973).

In light of the above, it is unnecessary to consider defendant's contentions concerning the Meade list in connection with the December warrants.

Likewise, defendant's preclusion claim can be dealt with summarily. The record is void of any active participation

by the government in the state proceeding. Under these circumstances, it is improper because of the lack of identity of parties to preclude the government's litigation of this issue. Cf. *United States v. Johnson,* 516 F.2d 209 (8th Cir. 1975); *Ferina v. United States,* 340 F.2d 837 (8th Cir. 1965). Further, from the present state of the record, it is unclear what exactly was determined in the state proceeding. Under these circumstances, the court is not bound by the prior determination. As to defendant's other arguments in this case such as comity, etc., the court feels they have been so inadequately presented in the brief and arguments that they must be deemed waived.

Turning then to the substantive question of the existence of probable cause, the facts are relatively simple and without dispute. On December 15, 1974 a state agent presented an affidavit to a State Judge in support of three search warrants. The affidavit is set out as Government Exhibit 2A and the search warrants as Government Exhibit 2B, 2C and 2D. Respectively the warrants authorized the search of defendant's home, a farm and his office. The films and other relevant items were seized under Exhibit 2D.

The law is clear that a search warrant may issue only upon a showing made before a neutral and detached magistrate that there is probable cause to believe that the items sought are located on the premises to be searched and are proper items for seizure. E.g. *United States v. U.S.D.C.,* 407 U.S. 297 (1972); *Coolidge v. New Hampshire, supra; Aguilar v. Texas,* 378 U.S. 108 (1964). Probable cause for a warrant is the same as for arrest and was defined as follows in *Brinegar v. United States,* 338 U.S. 160 at 175-76 (1940):

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt."

> • • • And this "means less than evidence which would justify condemnation" or conviction • • • Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the believe that" an offense has been or is being committed.

Clearly facts and not mere conclusions are required and these must appear on the face of the affidavit. *Rice v. Wolff,* 513 F.2d 1280 (8th Cir. 1975). Technical precision in drafting is not required but the issuing judicial officer must at the very least be given sufficient information to enable him to make a considered judicial determination of probable cause. *United States v. Harris,* 403 U.S. 573 (1971); *Aguilar v. Texas, supra; Jones v. United States,* 362 U.S. 257 (1960). Further, personal knowledge is not essential for the issuance of a search warrant and an affidavit based upon hearsay is sufficient if there is a substantial basis for crediting the hearsay presented. *Jones v. Texas, supra* at p. 269. Finally, the affidavit must be read as a whole giving the language used a common sense and realistic interpretation. *E.g. United States v. Harris, supra* at 577; *United States v. Bowers,* 534 F.2d 186 (9th Cir. 1976); *Spinell v. United States,* 393 U.S. 410 (1969).

Here applying these standards the court is of the view that the affidavit contains sufficient probable cause. Read as a whole the hearsay and informant information in the affidavit is sufficiently supported as to enable the issuing officer to make a determination of probable cause. Further, the personal knowledge of the affiant as to the conversation which he overheard verifying the other information

and the specificity as to date, time and place cannot be ignored.

It is therefore

ORDERED

1. Defendant's motion to dismiss part of count 1 and count 5 is granted.

2. Defendant's motion to suppress as to the September warrants is granted.

3. All other motions are denied.

August 29, 1977.

/s/ EDWARD J. MCMANUS,
Edward J. McManus, Chief Judge
United States District Court

Copies hand-delivered to parties by law clerk 8-29-77.
/s/ R. K. BIGELOW, *Deputy Clerk*

IN THE
IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
SW 31-1274

STATE OF IOWA,
Plaintiff,

—v.—

EDWARD J. WEDELSTEDT,
Defendant.

ORDERS

Search warrant forfeiture hearing, which was commenced on December 24, 1974, was resumed and concluded on January 17, 1975. The State was represented by Assistant Attorney General Joseph S. Beck and defendant Edward J. Wedelstedt was represented by James L. Chipokas and William J. Matias, Defendant Wedelstedt contested the forfeiture of 1,309 films alleged by the State to have been stolen from Chicago, Illinois.

The basis for the search warrant authorizing the seizure of these particular films is found in the second paragraph of the third page of the written narrative of the affiant, Michael Marlin, which written narrative is attached to and part of Mr. Marlin's Information For Search Warrant. A careful examination of this paragraph of the narrative

leads me to conclude that constitutional probable cause for the seizure is not established, and therefore the film must be restored to defendant Wedelstedt, from whom it was taken. 1973 Iowa Code Section 751.23.

IT IS HEREBY ORDERED that the 1,309 films in question be restored to Edward J. Wedelstedt. IT IS FURTHER ORDERED that execution of this order to restore the films be stayed for a period of 48 hours to allow the State or the United States to implement further legal proceedings in respect to the film, if there be an intention to do so.

Counsel for the State is directed to prepare and submit to the undersigned an appropriate order in respect to any other items seized in the search conducted pursuant to the search warrant.

Dated this 21st day of January, 1975.

/s/ HAROLD D. WITZ,
Judge, Sixth Judicial District of Iowa